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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

ROSE HILLS MEMORIAL PARK ASSOCIATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	4
Legal and Factual Background	4
Establishment of Rose Hills and the Commissioner's Reversal of Position	7
The Decision of the Trial Commissioner	11
The Decision of the Court of Claims	13
Reasons for Granting the Writ	16
I. The Decision Below Directly Conflicts With a Decision of the Second Circuit, Is Inconsistent With Legislative Policy and Involves a Question of Continuing Importance	17
II. The Decision Below in Its "Risk-Shifting" Analysis of the Basic Transaction in This Case Directly Conflicts With Principles Enunciated by This Court in *Commissioner* v. *Brown*, 380 U.S. 563 (1965)	24
III. The Lower Court's Decision Conflicts With *United States* v. *Byrum*, 408 U.S. 125 (1972), in Disregarding Long-standing Judicial Precedents Properly Relied Upon by Petitioner and Other Cemeteries in Framing Their Transactions	32
Conclusion	40

TABLE OF AUTHORITIES

CASES: Page

Alaska v. *American Can Co.*, 358 U.S. 224 (1959) 23
Burnet v. *Logan*, 283 U.S. 404 (1930) 29
Commissioner v. *Brown*, 380 U.S. 563 (1965) .....*passim*
Commissioner v. *Ferrer*, 304 F.2d 125 (2d Cir. 1962) .. 29
Commissioner v. *Kensico Cemetery*, 96 F.2d 594 (2d Cir. 1938) .....*passim*
Davis v. *United States*, 201 F. Supp. 92 (S.D. Ohio 1961) 21
Dixon v. *United States*, 381 U.S. 68 (1965) 34
Enterprise Ry. Equipment Co. v. *United States*, 142 Ct. Cl. 192, 161 F. Supp. 590 (1958) 19
Forest Lawn Memorial Park Ass'n, Inc., 45 B.T.A. 1091 (1941) .....*passim*
Forest Lawn Memorial Park Ass'n, Inc., 5 T.C.M. 738 (1946) .....*passim*
Fribourg Navigation Co. v. *Commissioner*, 383 U.S. 272 (1966) 34
Gardens of Faith, Inc. v. *Commissioner*, 345 F.2d 180 (4th Cir.), *cert. denied*, 382 U.S. 927 (1965) 31
Gilbert v. *Commissioner*, 248 F.2d 399 (2d Cir. 1957), *cert. denied*, 359 U.S. 1002 (1959) 31
Hamilton Memorial Gardens v. *Commissioner*, 394 F.2d 905 (6th Cir.), *cert. denied*, 393 U.S. 936 (1968) .. 31
Helvering v. *Bliss*, 293 U.S. 144 (1934) 21
Jefferson Memorial Gardens, Inc. v. *Commissioner*, 390 F.2d 161 (5th Cir. 1968) 31
Kimball Diamond Milling Co. v. *Commissioner*, 187 F.2d 718 (5th Cir.), *cert. denied*, 342 U.S. 827 (1951) 3
Knapp Bros. Shoe Mfg. Co. v. *United States*, 135 Ct. Cl. 797, 142 F. Supp. 899 (1956) 19, 24
Knollwood Memorial Gardens v. *Commissioner*, 46 T.C. 764 (1966) .....*passim*
Louis Berenson, 59 T.C. 412 (1972) 32
McCormac v. *United States*, 191 Ct. Cl. 483, 424 F.2d 607 (1970) 12
Ohio Furnace Co., 25 T.C. 179 (1955) 24
Passaic United Hebrew Burial Ass'n v. *United States*, 216 F. Supp. 500 (D. N.J. 1963) 21
Peterson v. *Commissioner*, 380 F.2d 1 (9th Cir. 1967) 31-32

Page

Saint Germain Foundation, 26 T.C. 648 (1956) 19
Sherwood Memorial Gardens, Inc. v. *Commissioner*, 350 F.2d 225 (7th Cir. 1965) 31-32
Trinidad v. *Sagrada Orden*, 263 U.S. 578 (1924) 19
Tuttle v. *United States*, 122 Ct. Cl. 1, 101 F. Supp. 532 (1961) 29
Union Bank v. *United States*, 152 Ct. Cl. 426, 285 F.2d 126 (1961) 24
United States v. *Byrum*, 408 U.S. 125 (1972) ..... *passim*
United States v. *Carruthers*, 219 F.2d 21 (9th Cir. 1955) 29
United States v. *Koppers Co.*, 348 U.S. 254 (1955) 12
Washington Park Cemetery Ass'n, Inc., 22 T.C.M. 1345 (1963) 12
Waterman S. S. Corp. v. *United States*, 381 U.S. 252 (1965) 17
Westminster Memorial Park v. *County of Orange*, 54 Cal.2d 488, 354 P.2d 247 (1960) 6

STATUTES:

California Corp. Code § 9200 (1955) 8
Income Tax Act of 1913, 38 Stat. 172 4
Internal Revenue Code of 1939, Section 101(5) 17
Internal Revenue Code of 1954:
Section 483 .....
Section 501(c)(3) 12
Section 501(c)(6) 23
Section 501(c)(7) 23
Section 501(c)(9) 23
Section 501(c)(10) 23
Section 501(c)(11) 23
Section 501(c)(13) ..... *passim*
Revenue Act of 1921, 42 Stat. 253 ..... 4, 20
Revenue Act of 1926, 44 Stat. 39 17
Revenue Act of 1928, 45 Stat. 812 17
Revenue Act of 1932, 47 Stat. 193 17
Revenue Act of 1950, 64 Stat. 947-60 39

Page

Tax Reform Act of 1969, 83 Stat. 492-549 39

28 U.S.C. § 1255(1) 2

28 U.S.C. § 1491 10

84 Stat. 1855 4

MISCELLANEOUS:

1946-2 Cum. Bull. 2 .....2, 7, 33

1960-2 Cum. Bull. 8 9

1961-2 Cum. Bull. 118 .....9, 23

Brief of the Commissioner of Internal Revenue, filed in *Commissioner* v. *Brown*, 380 U.S. 563 (1965) .. 27

Petition for Certiorari of the Commissioner of Internal Revenue, filed in *Commissioner* v. *Brown*, 380 U.S. 563 (1965) 27

Petition for Certiorari of the United States, filed in *United States* v. *Chicago, B. & Q. R.R.*, 197 Ct. Cl. 264, 455 F.2d 993 (1972), *cert. granted*, 409 U.S. 947 (1972) 23

Reply Brief for the United States, filed in *United States* v. *Byrum*, 408 U.S. 125 (1972) 36

P. Samuelson, *Economics* (8th Ed. 1970) 28

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this case.

OPINIONS BELOW

The opinion, findings and conclusions of the trial commissioner of the Court of Claims appear in the separate appendix accompanying this petition at App. 1a-76a. The opinion, findings and conclusions of the Court of Claims appear at App. 1b-66b. The opinion of the Court of Claims is reported at 463 F.2d 425.

JURISDICTION

The opinion of the Court of Claims, which constitutes its judgment in this case, was filed on July 14, 1972. A timely filed petition for rehearing was denied on December 12, 1972, by an order which appears at App. 1c. By order of February 21, 1973, Mr. Chief Justice Burger extended the time for the filing of this petition for certiorari to and including May 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

For over a hundred years, cemeteries have acquired property under sales contracts which obligate them to pay to the sellers a percentage of gross receipts obtained by the cemeteries on resale of the property as cemetery plots and for similar purposes. In *Commissioner* v. *Kensico Cemetery,* 96 F.2d 594 (1938), a unanimous Court of Appeals for the Second Circuit held that such a transaction did not jeopardize the federal tax exemption of a non-profit cemetery; the same result was reached by the Board of Tax Appeals in *Forest Lawn Memorial Park Ass'n, Inc.,* 45 B.T.A. 1091 (1941); and the Commissioner of Internal Revenue thereafter acquiesced in *Forest Lawn.* 1946-2 Cum. Bull. 2. In 1952 the petitioner here, organized under California law as a non-profit cemetery managed as a public trust, engaged in such a land acquisition transaction. Subsequently, the Commissioner repudiated his acquiescence in *Forest Lawn,* took the position that such transactions disqualify a cemetery from exemption under Section 501(c)(13) of the Internal Revenue Code of 1954, and sought retroactively to tax the petitioner as a non-exempt organization. Overruling its own trial commissioner, the Court of Claims in this

case sustained this construction of the statute and held that the petitioner was not exempt. The questions presented are:

1. Whether the lower court's construction of Section 501(c)(13), which directly conflicts with the Second Circuit's holding in *Kensico* and the Board of Tax Appeals' decision in *Forest Lawn* and which frustrates the intent of Congress, is erroneous.

2. Whether the lower court mistakenly has departed from this Court's decision in *Commissioner* v. *Brown*, 380 U.S. 563 (1965), by employing so-called "risk-shifting" criteria to characterize the petitioner's land acquisition as an equity investment by the former owners of the land rather than as a sale transaction.

3. Whether the lower court's decision conflicts with this Court's recent decision in *United States* v. *Byrum*, 408 U.S. 125 (1972), by abandoning a settled judicial construction of a tax statute reasonably relied upon by numerous taxpayers.[1]

STATUTE INVOLVED

Section 501(c)(13) of the Internal Revenue Code of 1954 exempted from federal income tax:

> "Cemetery companies owned and operated exclusively for the benefit of their members or which

[1] If certiorari is granted, petitioner will urge as related alternative reasons for reversal that the Court of Claims clearly misapplied its own self-defined risk-shifting criteria, that the Commissioner abused his authority in departing from his previously expressed acquiescence, and that the doctrine of *Kimball-Diamond Milling Co.* v. *Commissioner*, 187 F.2d 718 (5th Cir.), *cert. denied*, 342 U.S. 827 (1951), governs the basis of petitioner's assets if it is not exempt. Petitioner will also maintain its position that operation of a mortuary does not disqualify an otherwise exempt cemetery. See p. 13, n. 10, below.

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are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual."[2]

STATEMENT OF THE CASE

Legal and Factual Background. One of the oldest exemptions in the federal income tax laws is directed to public cemeteries. An exemption provision was included in the original Income Tax Act of 1913 (38 Stat. 172) and a substantially broader exemption was substituted in the Revenue Act of 1921. 42 Stat. 253. The latter provision has been carried forward in essentially the same terms to Section 501(c)(13) of the Internal Revenue Code of 1954. That provision exempts both cemetery companies "which are not operated for profit" and, subject to certain conditions, any cemetery corporation "no part of the net earnings of which inures to the benefit of any private shareholder or individual."

As it is for schools, hospitals and other exempt organizations, the tax exemption is highly significant

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[2] Following the period involved in this case, the statutory language quoted above was amended in 1970 to make clear that the exemption applied to cemeteries utilizing cremation as well as those utilizing burial (84 Stat. 1855) but the statute is otherwise essentially unaltered. It now reads:

"Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

to cemeteries. It means, among other things, that receipts which would otherwise be payable as taxes can be used for the physical improvement and maintenance of the cemetery grounds; and it also means that a larger amount may be contributed to the separate endowment fund which many states require in order to assure perpetual upkeep of cemetery properties when the cemetery is filled and new receipts ultimately cease. Accordingly, many cemeteries have been organized on a non-profit basis. See App. 49a, 42b.[3]

Cemeteries have long faced special difficulties in obtaining financing for land acquisition and other improvements. Not only are their properties dedicated to public purposes, but the use of the land for burial purposes makes it poor collateral for banks or other lenders. A solution, adopted more than a century ago, has been for the new or expanding cemetery to purchase land not by an initial cash outlay but by a commitment to pay the seller over the course of time a fixed portion of the gross receipts realized by the cemetery when the land is resold for cemetery plots and like purposes. See App. 48a-49a, 7b.

A statute sanctioning this deferred payment method of financing was enacted in New York as early as 1847. See *Commissioner* v. *Kensico Cemetery*, 96 F.2d 594, 596 (2d Cir. 1938). Similarly, practically all of the major non-profit cemeteries in California started by acquiring either land or an existing cemetery under such a deferred payment contract with the seller's com-

[3] All citations to "App. —" are to the accompanying separate appendix containing the opinion, findings and conclusions of the trial commissioner and the opinion, findings and conclusions of the Court of Claims.

pensation depending upon a percentage of the cemetery's receipts.[4] Because they meet a basic business need, such contracts have been widely used by cemeteries in many other areas of the country. See App. 7b.

Many years ago the question arose whether the periodic payments under such contracts to the original sellers were inconsistent with the requirements of the tax exemption statute that the cemetery be "non-profit" or that "no part of the net earnings" of the cemetery "inure to the benefit of any private shareholder or individual." In 1938 a unanimous Court of Appeals for the Second Circuit ruled that such a transaction was not inconsistent with the requirements for tax exemption. *Commissioner* v. *Kensico Cemetery,* 96 F.2d 594 (1938). The court held in substance that the payments were not a distribution of profits or net earnings by the cemetery but represented payments of the purchase price for land properly acquired to carry on the basic exempt purpose of operating a cemetery.

The same conclusion was reached by the Board of Tax Appeals in *Forest Lawn Memorial Park Ass'n, Inc.,* 45 B.T.A. 1091 (1941), and then by the Tax Court in *Forest Lawn Memorial Park Ass'n, Inc.,* 5 T.C.M. 738 (1946). At about this time the Commissioner of Internal Revenue, who had declined to acquiesce in *Kensico* or the first *Forest Lawn* decision, withdrew his

[4] The California Supreme Court recently explained, in a discussion of such deferred payment, percentage contracts, that: "It must be remembered that the type of contract here in use was not a device dreamed up by the respondent and the sellers as a means of avoiding taxes. This type of contract is well-known to the law, and has been used in the cemetery field for many years. It has been in use in California at least since 1880." *Westminster Memorial Park* v. *County of Orange,* 54 Cal.2d 488, 495, 354 P.2d 247, 252 (1960).

non-acquiescence in *Forest Lawn* and substituted an acquiescence. 1946-2 Cum. Bull. 2. There is no indication that in the succeeding fifteen years the Commissioner ever denied an exemption or sought to tax an assertedly exempt cemetery on account of its use of such a land acquisition contract where a reasonable purchase price was involved.

Establishment of Rose Hills and the Commissioner's Reversal of Position. Rose Hills Memorial Park Association ("Rose Hills"), the petitioner in this Court, was organized in 1950 under California law as a non-profit cemetery managed by trustees as a public trust. App. 27a, 17b. In that same year, Rose Hills began operations by acquiring a small tract of land near Los Angeles as a successor to a cemetery founded there in 1915. The formation of Rose Hills thus represented the evolution of a long-established cemetery, and it provided the basis for a substantial further expansion of cemetery facilities available to the community. In 1952 the Commissioner acknowledged Rose Hills to be exempt from federal income tax under the exemption provision now contained in Section 501(c)(13). App. 23a, 73a, 17b, 64b.

In December 1952, in the transaction which is the focus of this case, Rose Hills acquired a vast adjoining tract of land owned by Bartolo Corporation. App. 32a, 25b.[5] As consideration for the sale of their land, the

[5] The Bartolo tract added over 2,000 acres to Rose Hills and makes it the largest single tract cemetery in the country; at the time of the acquisition only about 200 acres were dedicated cemetery land but virtually all of the land has since been dedicated for cemetery use. App. 3a, 43b. The transaction took the form of an acquisition of the Bartolo stock by Rose Hills, but Bartolo has since been liquidated so the properties are owned directly by Rose Hills. App. 4a, 61b.

former stockholders of Bartolo were entitled under the contract to receive 30 percent of the gross receipts obtained by Rose Hills from future sales of the transferred land for grave sites and varying percentages of gross receipts on sales of the land for other burial related purposes. App. 4a, 4b. This obligation existed regardless of whether Rose Hills had any net income after its expenses were covered. The former Bartolo stockholders had no claim against other substantial revenues Rose Hills would receive from other cemetery activities.[6] All profits of Rose Hills are required to be retained for development and maintenance of the cemetery. California Corp. Code § 9200 (1955).

There were several reasons for establishing Rose Hills on a non-profit basis, all of which contribute to the fulfillment of its public purpose as a non-commercial cemetery. They included, importantly, the fact that a for-profit business could not justify retention of such a vast amount of valuable California land for cemetery use since income from that use could be realized only over the course of many years. Under California law a non-profit cemetery, unlike a for-profit cemetery, has eminent domain power and is itself protected from condemnation by other institutions having eminent domain power except where the other institution demonstrates that its proposed use serves an even greater public purpose. Finally, a non-profit cemetery is exempt from a range of taxes under both state and federal law, including both property and income taxes,

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[6] Rose Hills has had increasing revenues from interments, markers, vaults, mortuary services and similar activities. See App. 4a. In 1968, for example, only 40 percent of Rose Hills' gross receipts were subject to the payment obligation. Hearing Transcript 736, 791.

so non-profit status enables the cemetery to use its net earnings for maintenance, improvement, and expansion.[7]

After Rose Hills obtained its exemption ruling from the Commissioner and made its main property acquisition from Bartolo in 1952, it undertook a program of major development during the next fifteen years. App. 52a-53a, 45b. At a cost of nearly $8 million, existing buildings were improved and new ones including two chapels were built and hundreds of acres of new land were cleared and graded to provide grave sites. App. 53a, 45b. After a period of cash shortages and financial stringency, Rose Hills' financial position stabilized during the 1960's as it began to benefit from its new improvements. App. 52a-69a, 45b-61b. It now operates on a sound financial basis—subject to the outcome of this case.

Contemporaneously with this final phase of Rose Hills' development, the Commissioner began to revise his position on the tax consequences of the deferred payment, percentage contract for cemetery land acquisition. In 1960 he withdrew his acquiescence in *Forest Lawn* which had stood for almost fifteen years. 1960-2 Cum. Bull. 8. In 1961 he issued a revenue ruling which adopted the broad position that such transactions are inconsistent with exemption under Section 501(c)(13) on the ground that the purchase price would normally be unreasonable and would thus constitute an inurement of net earnings to the seller forbidden by the exemption statute. 1961-2 Cum. Bull. 118. In 1966, the Commissioner refused to acknowledge

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[7] See Hearing Transcript 506-07, 510, 696-97, 699, 701-03, 837, 920. Rose Hills has in fact made use of its condemnation power. See App. 57a.

the exempt status of the newly organized, assertedly non-profit Knollwood cemetery which had acquired its land through such a transaction.

In *Knollwood Memorial Gardens* v. *Commissioner*, 46 T.C. 764 (1966), the Tax Court sustained the Commissioner. The court held that despite the form of the transaction, there was "in reality" no sale of the land since the alleged purchase price had "no reasonable relationship to the fair market value of the assets conveyed . . . ." 46 T.C. at 783. By contrast to Rose Hills, the acquisition in *Knollwood* did not represent the expansion of a long-established cemetery, and the Tax Court viewed the transaction as one contrived to extract an unreasonable return from low-value farm land in a very brief period. The court carefully distinguished both *Kensico* and *Forest Lawn* on a number of grounds including the absence of any affirmative evidence in those cases that the transaction resulted in unreasonable compensation to the sellers. *Id.* at 786.

In the very year that *Knollwood* was decided, the Commissioner on March 10, 1966, withdrew his ruling that Rose Hills was tax exempt and asserted that it would be regarded as non-exempt for all years beginning after September 30, 1961. See App. 73a, 64b. Rose Hills protested this action without success and thereafter paid federal income taxes for its fiscal year 1965. In accordance with the usual procedure to test a denial of exempt status, Rose Hills then brought the present suit in the Court of Claims for a refund, asserting that it properly qualified as an exempt organization under Section 501(c)(13).[8]

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[8] The jurisdiction of the lower court is conferred by 28 U.S.C. § 1491.

The Decision of the Trial Commissioner. Rose Hills' refund suit was referred to a trial commissioner of the Court of Claims, and evidentiary hearings and briefing followed. On May 24, 1971, the trial commissioner rendered an opinion together with extensive findings and conclusions. App. 1a-76a. After examining the facts and legal standards including pertinent legislative history, he determined that Rose Hills was exempt under Section 501(c)(13) and was entitled to the claimed refund. App. 76a.

The trial commissioner stated that, as the parties agreed, the exempt status of the cemetery depended on the nature of the 1952 transaction by which Rose Hills acquired the Bartolo property. App. 3a. While Rose Hills contended that the transaction was a deferred payment sale of land, the Government contended that it gave the sellers an equity interest in Rose Hills which rendered the subsequent payments dividends and, as such, a distribution of profits or an inurement of "net earnings" prohibited by the exemption statute. The trial commissioner stated that, while the record was extensive, "classification of the 1952 transaction as a sale almost inevitably follows from a relatively few factual propositions as to which there is no real conflict in the evidence." App. 4a.

The trial commissioner found, based on undisputed factual evidence, that the total projected payments by Rose Hills to the former Bartolo stockholders as adjusted to present value would not exceed the reasonable present fair market value of the property sold by those stockholders. App. 7a-8a, 51a-52a. The evidence showed that the 1952 value of the property was approximately $10 million; the projected payments to the

former Bartolo stockholders, discounted to present value and imputing an appropriate interest factor, had a 1952 value of approximately $7 million, a figure well within the limits of the property's fair market value. App. 7a-8a.[9] The trial commissioner noted that the significance of a reasonable purchase price to a finding of bona fide sale was emphasized in the *Knollwood* case. App. 8a-9a.

The trial commissioner stated that the use of the deferred payment, percentage contract for land acquisitions is a long-standing practice in the development of cemeteries and meets a legitimate financing purpose. App. 5a-6a, 48a-49a. He pointed out that the transaction's appropriation of the Bartolo property for cemetery use did not enhance the property's market value. App. 9a. He noted also that the pay-

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[9] It is well established that when sale payments are made over the course of a number of years, the reasonableness of the transaction depends upon the present value of the future payments; and the future payments must be discounted to reflect the fact that the seller does not obtain immediate use of the money. Accordingly, an interest factor is imputed which recognizes that the buyer's eventual payments include not only compensation for the value of the property but also amounts equivalent to interest on what is in substance a financing arrangement between the seller and the buyer. *McCormac* v. *United States*, 191 Ct. Cl. 483, 500, 424 F.2d 607, 620 (1970); *Washington Park Cemetery Ass'n, Inc.*, 22 T.C.M. 1345, 1358 (1963); Int. Rev. Code of 1954, § 483. See also *United States* v. *Koppers Co.*, 348 U.S. 254, 267 (1955), and p. 28, n. 23, below.

In this case, the total payout was estimated at $123,000,000 over many years. App. 5a. In order to put both sides of purchase price/property value equation on the same footing, either the total payout must be reduced to present value or the land's value must be enlarged from present value to reflect its total earning power over the period during which the purchase price is being paid. The normal method is to discount the estimated total payout and that is what the trial commissioner did here. App. 7a.

ments under the sales contract constituted the Bartolo stockholders' only consideration and that the agreement gave the sellers no participatory interest in Rose Hills' net income. App. 4a.

Finally, the trial commissioner held that Rose Hills' claim to exempt status was directly supported by the decisions in *Kensico* and the two *Forest Lawn* cases. App. 6a, 9a. By contrast no case had been found in which a court denied the existence of a sale even though the seller had obtained no more than his property was worth. App. 8a. The trial commissioner reviewed in painstaking detail the legislative history of the cemetery-exemption provision now embodied in Section 501(c)(13), and he concluded that "the legislative activity set forth above leaves no room for real doubt that if the language of section 501(c)(13) is given the meaning that its originators expressly and uniformly intended," Rose Hills was entitled to its exemption. App. 21a.[10]

The Decision of the Court of Claims. On review of the trial commissioner's decision, the Court of Claims concluded that Rose Hills was not entitled to exempt status. App. 1b-66b. It agreed that the issue turned on the effect to be given to the 1952 land acquisition

[10] The trial commissioner also considered and rejected a subsidiary contention of the Government that Rose Hills should be denied an exemption on the ground that its operation of a mortuary in connection with the cemetery involved a business not necessarily incident to Rose Hills' cemetery function under Section 501(c)(13). App. 22a, 69a-71a. The mortuary could be discontinued if that proved a precondition to exemption; but the trial commissioner's discussion shows that the provision of mortuary services is clearly a functional part of Rose Hills' cemetery operations and those services are offered only for decedents expected to be buried at Rose Hills. App. 22a, 69a-71a.

agreement (App. 3b-4b) and did not question the trial commissioner's basic factual findings; indeed, it borrowed heavily from them. See App. 1b. However, it accepted the Government's contention that the land acquisition by a deferred payment, percentage contract should be deemed to give the sellers "an equity interest" in the buyer, thus rendering the payments a distribution of profits or net earnings impermissible under Section 501(c)(13). See App. 6b-7b, 14b.

In determining that the 1952 transaction gave rise to an investment-equity relationship rather than a sale-purchase price relationship, the Court of Claims stressed a number of factors generally common to the deferred sale, percentage contract. App. 11b. For example, it pointed to the lack of a specific maturity date, a fixed price, or a stated interest rate. App. 11b-12b. It rejected Rose Hills' argument that *Commissioner* v. *Brown*, 380 U.S. 563 (1965), precluded an analysis of the transaction cast in terms of "risk-shifting," holding that risk-shifting "becomes relevant in a situation like that before us." App. 12b-13b. It found irrelevant elements in the transaction which Rose Hills relied upon as demonstrating that a sale was involved, such as the established reasonableness of the purchase price, the lack of any claim by the Bartolo sellers to any portion of Rose Hills' net earnings, and the inevitable termination of the sellers' rights to any payments whatever after final disposition of the land.

The Court of Claims in substance declined to follow *Kensico* and *Forest Lawn*, stating that in its view both "have been considerably weakened by subsequent cases." App. 15b. None of the subsequent cases referred to by the court, however, involved the exempt status of cemeteries except for the *Knollwood* case.

See pp. 31-32, below. Yet, while relying on *Knollwood,* which involved a land transfer at an unreasonable price (see p. 10, above), the Court of Claims did not dispute the trial commissioner's finding that the present value of the projected payments in this case did not exceed the property's fair market value at the time of the transfer. App. 14b.[11]

Shortly before the Court of Claims rendered its decision this Court decided *United States* v. *Byrum,* 408 U.S. 125 (1972). That decision, which is discussed at length below, re-emphasized the undesirability of departing from prior judicial interpretations of tax statutes likely to have been relied upon by taxpayers in framing their transactions.[12] Petitioner called *Byrum* to the lower court's attention in a supplemental memorandum tendered without objection from the Government. The Court of Claims on the same day it issued its own decision in this case denied permission to file the memorandum, without prejudice to renewal of the

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[11] The court below stated that it did not attach "the same significance to present value" of the anticipated payments as to the "total payout" which is larger and necessarily indefinite. App. 14b. This is simply another way of asserting that any deferred payment, percentage-based land acquisition will destroy a cemetery's exempt status. For, wherever the transaction makes economic sense, the "total payout" will always be large in relation to the present value of the property in order to compensate for the deferral of payments, and, because of the percentage feature, will necessarily be subject to approximation.

[12] In particular, the opinion in *Byrum* stated that "courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. . . . When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned." 408 U.S. at 135.

point by motion for rehearing; when such a motion was filed the court denied rehearing without opinion. App. 1c.

REASONS FOR GRANTING THE WRIT

The granting of the petition for certiorari in this case is supported by not one but several of the grounds that are traditionally deemed sufficient by this Court to justify plenary review. The decision of the Court of Claims is in direct conflict with the long-standing, unanimous decision of the Court of Appeals for the Second Circuit, a court of coordinate jurisdiction. *Commissioner* v. *Kensico Cemetery*, 96 F.2d 594 (1938). The decision below is also at odds with the legislative history which illuminates the statute sought to be construed. And, in its analysis, the Court of Claims has departed from applicable governing principles reaffirmed in two recent decisions of this Court. *Commissioner* v. *Brown*, 380 U.S. 563 (1965); *United States* v. *Byrum*, 408 U.S. 125 (1972).

In addition, the decision below involves a recurring issue of substantial importance. It will severely and adversely affect not merely the petitioner but a large number of heretofore exempt cemeteries throughout the United States which have engaged over many years in comparable transactions in reliance on legal principles and decisions the lower court has now repudiated. Indeed, during the period in which the petitioner entered into the transaction at issue, the Commissioner of Internal Revenue had outstanding a published acquiescence in a leading decision of the Board of Tax Appeals holding that such a transaction did not jeopardize a cemetery's exemption. See pp. 6-7, above.

I. The Decision Below Directly Conflicts With a Decision of the Second Circuit, Is Inconsistent With Legislative Policy and Involves a Question of Continuing Importance.

The decision below is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Commissioner* v. *Kensico Cemetery*, 96 F.2d 594 (1938). It is similarly in conflict with the decision of the Board of Tax Appeals, predecessor to the Tax Court, in *Forest Lawn Memorial Park Ass'n, Inc.*, 45 B.T.A. 1091 (1941), and with the decision of the Tax Court in *Forest Lawn Memorial Park Ass'n, Inc.*, 5 T.C.M. 738 (1946). A conflict between a Circuit Court and the Court of Claims is, of course, an established ground for certiorari. *E.g., Waterman S.S. Corp.* v. *United States*, 381 U.S. 252, 258 (1965).

In *Kensico*, as here, the question posed was whether a cemetery lost its exempt status because of its acquisition of land through a deferred payment, percentage contract. The contract there involved, which is not materially different from that involved here, provided that the cemetery would compensate the sellers for the land by paying them a fixed percentage of the gross receipts realized by the cemetery on resale of the property for use for individual cemetery plots and similar purposes. 96 F.2d at 595-96. The language of the applicable cemetery exemption statute involved in *Kensico* is identical to the language of Section 501(c)(13) of the 1954 Code, with which this case is concerned. *Id.* at 594-96.[13] As in the present case, in *Kensico* the Com-

[13] That case involved a period governed by the cemetery exemption provision of the successive Revenue Acts of 1926, 1928, and 1932; each of them used the precise language carried forward first to Section 101(5) of the 1939 Code and then to Section 501(c)(13) of the 1954 Code. See 44 Stat. 39, 45 Stat. 812, 47 Stat. 193.

missioner took the position that as a result of the deferred percentage payments the cemetery must be deemed a profit-making enterprise whose net earnings inured in part to the sellers of the land; on this ground, the Commissioner argued that the cemetery was not entitled to the tax exemption. 96 F.2d at 595-96.

In rejecting this precise contention, the unanimous Court of Appeals made a number of observations, directly applicable here, concerning both the nature of the cemetery's obligation to the sellers and the public policy underlying the exemption statute. The court said that the obligation created by the contract did not create on the part of the sellers "an interest in the net earnings of the cemetery" but rather gave rise to "an indebtedness altogether independent of the question of 'net earnings.'" 96 F.2d at 596. The court explained that the cemetery like any other exempt organization could properly incur debts in order to carry out its exempt purpose without forfeiting its exemption: "Exempt charities and churches are frequently indebted on real estate mortgages and some form of security is issued therefor." *Id.* Their payment of such obligations is not a distribution of profits by them or an inurement of net earnings to private parties. *Id.* The significant factor is that "the cemetery's revenues resulted from and were devoted to the purposes for which the statute desires them to be exempt . . . ." *Id.*

The principle underlying *Kensico* is fundamental to the ability of exempt organizations to perform the functions for which they were exempted by Congress. Like any other corporation, exempt organizations must pay salaries to their employees, acquire real estate for their headquarters and activities and make

other payments to those who sell them goods or services to carry on their operations. Such exempt organizations are often at the same time taking in revenues, as churches do through contributions or schools through the returns on their invested endowments. See generally *Trinidad* v. *Sagrada Orden*, 263 U.S. 578, 581-82 (1924). The subsequent payment by an exempt organization of debts properly incurred in the performance of its exempt functions—where, as here, the payments are reasonable in relation to the property or services obtained—has never been deemed to deprive the organization of its exemption.[14]

Kensico, which is virtually on all fours with the present case, can hardly be dismissed as an arbitrary or eccentric decision. It represented the views of a unanimous Court of Appeals which included Judge Augustus Hand. It was followed shortly thereafter by the first *Forest Lawn* decision, in which the Board of Tax Appeals relied on *Kensico* among other precedents. 45 B.T.A. at 1104. This was followed in turn by the second *Forest Lawn* decision, in which the newly organized Tax Court reached the same result. The Commissioner acquiesced in the Board's decision and maintained that acquiescence for almost 15 years, during which time Rose Hills entered into the transaction at issue in this case. See pp. 6-8, above.

The result reached in *Kensico* is supported by the legislative history pertaining to the cemetery exemption provision now contained in Section 501(c)(13).

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[14] See, *e.g.*, *Enterprise Ry. Equipment Co.* v. *United States*, 142 Ct. Cl. 192, 161 F. Supp. 590 (1958) (salary); *Saint Germain Foundation*, 26 T.C. 648 (1956) (expenses); *Knapp Bros. Shoe Mfg. Co.* v. *United States*, 135 Ct. Cl. 797, 142 F. Supp. 899 (1956) (acquisition of business).

The most relevant passages from the Senate debate are set forth at length in the trial commissioner's opinion (see App. 10a-21a), and as the trial commissioner stated after analyzing this legislative history, it "leaves no room for real doubt" that Congress did not intend to deny the exemption in a situation such as the present one. App. 21a.

The trial commissioner relied on the legislative history incident to the 1921 amendment which extended the exemption for cemeteries from those run "exclusively for the benefit of their members" to include also those "not operated for profit" and those, subject to certain conditions, "no part of the net earnings of which inures to the benefit of any private stockholder or individual." Revenue Act of 1921, 42 Stat. 253. The latter provision was adopted on the Senate floor as a compromise amendment acceptable both to Senators who wished to exempt from direct federal taxation all cemeteries including those which paid dividends and to other Senators who were essentially satisfied with the pre-existing narrow exemption. Compare App. 12a-14a with App. 15a-16a.

After extensive debate the present language was agreed upon. The sponsor of the compromise provision explained that it would exempt a cemetery where the cemetery's profits were "used for public purposes," for example, for the upkeep and beautification of the cemetery. App. 20a. In response to a question whether the exemption would apply if the cemetery paid dividends, however, the amendment's sponsor explained that it would not, stating "if the profits are distributed, it [the cemetery] comes without the provision of this amendment." App. 20a. The acquisition of cemetery land is as significant a part of ceme-

tery operations as the beautification of the cemetery; and payments for the land, where such payments are reasonably related to its value, are in no sense equivalent to "dividends."

The Court of Claims' disregard for the manifest intent of Congress is, like the conflict with the Second Circuit and the Tax Court, a proper basis for review by this Court. Plenary review, in order to carry out legislative policy, is especially warranted in this instance because of the strong public interest in favor of the activities of exempt organizations and the settled rule that exemption provisions relating to such organizations—unlike most exemptive provisions of the tax law—are to be broadly construed in favor of the organization.[15] This rule of generous construction would justify the trial commissioner's appraisal of the legislative intent even if the legislative history were far less specific than it is here.

A final related reason for review by this Court is the recurring nature of the legal questions presented by use of the deferred payment, percentage contract in this context. As the Court of Claims itself recognized, "this issue is not uncommon to cemetery companies because frequently they are unable to get adequate financing for land acquisitions." App. 7b. The trial commissioner found that practically all of the major exempt cemeteries in California have made deferred payment, percentage-based land acquisitions either in commencing operations or in financing expansion. App. 49a. It is clear that the same pattern

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[15] *E.g.*, *Helvering* v. *Bliss*, 293 U.S. 144 (1934); *Passaic United Hebrew Burial Ass'n* v. *United States*, 216 F. Supp. 500 (D. N.J. 1963); *Davis* v. *United States*, 201 F. Supp. 92 (S.D. Ohio 1961).

of financing cemeteries has been utilized in many other states. See App. 7b.

Such transactions have continuing tax consequences since payments may be made pursuant to contracts for many years. The Commissioner can and, if the decision below stands, certainly will move to withdraw the exemptions of cemeteries established long ago which are currently making payments under contracts like that involved here. Indeed, as the present case shows, the Commissioner does not hesitate to apply the revocation retroactively. In either event, the revocation is likely to have severe financial consequences for the organizations and for the public interest.[16]

The impact of the decision on future transactions is also a matter for concern. There continue to exist the same constraints on other methods of cemetery financing that led to the present deferred payment, percentage contract, and the approach followed below will severely handicap the establishment of new non-profit cemeteries and the growth of existing ones. Such consequences cannot be deemed irrelevant since Congress has by enacting Section 501(c)(13) made the viability of non-profit cemeteries a matter of public policy.

It is apparent that the Commissioner will adopt in subsequent cases the same position taken here, which rests upon a broad legal contention applicable to any deferred payment, percentage-based acquisition of land for cemetery purposes. Shortly after withdraw-

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[16] These consequences are due not only to the loss of the exemption itself but to the fact that the exemption is withdrawn after the cemetery has entered into a binding contractual commitment to make payments at a level that may be financially possible only if the exemption continues. See pp. 38-39, below.

ing his acquiescence in *Forest Lawn,* the Commissioner issued a revenue ruling stating his position in general and unqualified terms and reflecting his intention generally to contest exemptions in such cases. 1961-2 Cum. Bull. 118. Taking into account such other cemeteries, resolution of the issue in this case will determine whether many millions of dollars in taxes must be paid now and in the years ahead by heretofore exempt cemeteries. If the Commissioner were supporting rather than opposing certiorari, a precise estimate of the amount would doubtless be furnished to this Court by the Commissioner as a reason for plenary review.[17]

Lastly, the critical phrase in Section 501(c)(13)—prohibiting inurement of the exempt organization's net earnings to the benefit of private parties—is common to a number of the exemption provisions in the Internal Revenue Code. See Section 501(c)(3) (religious, charitable and educational institutions, among others); (c)(6) (business leagues); (c)(7) (clubs); (c)(9) (beneficiary associations); (c)(10) (fraternal lodges); (c)(11) (teachers' retirement funds). Acquisitions by such organizations pursuant to deferred

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[17] The tax imposed in the present case alone was almost a quarter of a million dollars for a single year (App. 3b); the number of years potentially involved is substantial (App. 6b); and the number of cemeteries that may be affected is large. See pp. 5-6, above. The financial magnitude of the issue presented is relevant in deciding whether to grant certiorari (*e.g., Alaska* v. *American Can Co.*, 358 U.S. 224, 225 (1959)), and the Government frequently furnishes such dollar estimates in petitions urging a grant of certiorari. See, *e.g.*, Petition for Certiorari of the United States, pp. 15-16, filed in *Chicago, B. & Q. R.R.* v. *United States*, 197 Ct. Cl. 264, 455 F.2d 933, *cert. granted*, 409 U.S. 947 (1972).

payment contracts of many types are not uncommon.[18] The same analysis sanctioned by the Court of Claims in this case may be employed by the Commissioner to deprive many other organizations of their exemption on account of similar transactions wherever percentage payments are utilized and possibly even where they are not. Thus, even beyond the substantial adverse consequences of the decision for exempt cemeteries, the decision can have ramifications for numerous other exempt organizations.

II. The Decision Below in Its "Risk-Shifting" Analysis of the Basic Transaction in This Case Directly Conflicts With Principles Enunciated by This Court in Commissioner v. Brown, 380 U.S. 563 (1965).

The court below based its denial of tax-exempt status to Rose Hills on the ground that the former Bartolo stockholders had acquired an equity interest in Rose Hills as a result of the 1952 transaction which provided Rose Hills with most of its land. App. 11b, 14b. In order to characterize the transaction as creating an equity interest, the lower court resorted to an analysis of the transaction in terms of so-called "risk-shifting" factors.[19] The approach adopted is directly inconsis-

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[18] *E.g.*, *Commissioner* v. *Brown*, 380 U.S. 560 (1965) (medical research institute); *Union Bank* v. *United States*, 152 Ct. Cl. 426, 285 F.2d 126 (1961) (university foundation); *Knapp Bros. Shoe Mfg. Corp.* v. *United States*, 135 Ct. Cl. 797, 142 F. Supp. 899 (1956) (university); *Ohio Furnace Co.*, 25 T.C. 179 (1955) (church educational foundation).

[19] This analysis, as formulated by the Government in *Commissioner* v. *Brown*, 380 U.S. 563 (1965), purports to determine whether the terms on which a business is sold sufficiently shift the "business risk" of future operations from seller to buyer and, on this basis, to determine whether deferred payments imperil the buyer's exempt status or constitute dividends to the seller rather than capital gains.

tent with this Court's decision in *Commissioner* v. *Brown*, 380 U.S. 563 (1965).

The trial commissioner found, consistent with Rose Hills' position, that the 1952 transaction was a bona fide sale at a reasonable price which created a money obligation involving deferred payments. There can be no serious argument that this characterization, if accepted, would secure Rose Hills' tax exemption. Deferred money payments for land acquired at a reasonable price are certainly not an inurement of net earnings to private parties on any reading of Section 501(c)(13). See pp. 18-19, above. The Court of Claims, however, accepted the Government's fall-back position that the transaction gave the former Bartolo stockholders "an equity interest" in Rose Hills and that "accordingly . . . the payments to the transferors constitute corporate distributions of net earnings in violation of § 501(c)(13)." App. 6b-7b.[20]

The Court of Claims did not question any of the basic factual premises on which the trial commissioner had rested his conclusion, and, indeed, there was no real conflict in the evidence as to contract terms, appraised worth of the land and similar matters. Rather, the lower court adopted the legal analysis urged by the Government. It concluded that the "substance" of the transaction "resembles an equity interest" when

[20] The Commissioner's 1961 ruling directed against deferred payment, percentage contracts for cemetery land acquisition had asserted that such contracts normally involved *unreasonable* payments (see p. 9, above), and his 1966 letter revoking Rose Hills' exemption similarly asserted that the price was unreasonable. Pl. Ex. 128. When petitioner met this basic contention by evidence proving the reasonableness of the price here, the Government retreated to its "equity interest" argument.

evaluated in terms of risk-shifting criteria. App. 11b. It specified, among such considerations, the lack of an unqualified payment obligation, the failure to specify an explicit interest rate, and the absence of a definite maturity date on which the sellers' claims would expire. App. 11b-12b. The lower court considered Rose Hills' argument that under this Court's *Brown* decision "if a valid sale has occurred, the above-mentioned criteria for determining the degree of risk-shifting become inapplicable" but it explicitly rejected this reading of *Brown*. App. 12b-13b.

The lower court's approach cannot be squared with this Court's decision in *Brown*, which considered whether the sale of a business for deferred payments could be treated by the Commissioner as actually creating a disguised equity interest.[21] There, the taxpayer sold his business to an exempt organization for a fixed sum payable, on the installment basis, solely out of fixed percent of the future earnings of the business; the seller continued to manage the business as before and retained a right to rescind the transaction if payments fell short of specified minimums. 380 U.S. at 566-69. The Government argued that the seller was not entitled to capital gains treatment on receipt

[21] Although the issue immediately involved in *Brown* was capital gains treatment, under the Government's basic rationale the transaction similarly jeopardized the buyer organization's exempt status. Thus this Court observed that "the Commissioner . . . in 1954, announced that when an exempt organization purchased a business and leased it for five years to another corporation, not investing its own funds but paying off the purchase price with rental income, *the purchasing organization was in danger of losing its exemption* . . . . and most important for this case, that the payments received by the seller would not be entitled to capital gains treatment." 380 U.S. at 566 (emphasis added).

of the deferred payments. In support of this argument, it reasoned, as it seeks to do in this case, that the transaction in reality left the seller with a retained equity interest when judged by the risk-shifting criteria favored by the Government.

This Court flatly rejected the line of analysis on which the Government's argument depended. The Court stated that the transaction was a sale within the normal understanding of that term; that taking account of an imputed interest factor the price was "within a reasonable range"; that the sale involved a significant economic event; and, most importantly, that risk-shifting of the kind insisted on by the Government was not a prerequisite to a sale. 380 U.S. at 572-74. In these circumstances, the Court did not hold that the Government had misapplied its risk-shifting analysis; it held that "risk-shifting of the kind insisted on by the Commissioner has not heretofore been considered an essential ingredient of a sale for tax purposes" and it declined to adopt this new approach "absent congressional guidance in this direction." 380 U.S. at 574-75.

The transaction in this case was similarly a sale within the conventional meaning of that term, *i.e.*, a disposition of property compensated by a right to receive payments for a limited time.[22] The transaction undeniably had economic significance, since the former

[22] The similarity between the issue in *Brown* and in this case is underlined by the Government's briefs in *Brown*. There, the Commissioner's petition for certiorari (p. 22, n.28) and his opening brief on the merits (pp. 69-70) referred to cemetery acquisition arrangements as illustrating another form of transaction raising the same basic problem and he cited both *Kensico* and *Forest Lawn*.

Bartolo stockholders' pre-existing right to all net income from the transferred property was eliminated and they received in return only a right to certain specified percentage payments, depending on receipts from some but not all of the cemetery's activities; and that right itself was bound to expire since "the physical dimensions of the property created a reasonably determinate ceiling on the number of graves that can be sold." App. 5a. The price, finally, was entirely reasonable judged by the touchstone of present value.[23]

The Court of Claims' opinion is quite candidly a throwback to the risk-shifting analysis urged without success by the Government in *Brown*. In both cases the Government argued that, even though there may be a bona fide disposition of property, the price may be reasonable, and the seller's claims limited to money payments for a limited period, nevertheless the transaction can be impeached as a sale and reclassified as an equity investment by use of the Government's risk-shifting criteria. Petitioner has contended throughout that under *Brown* such criteria are irrelevant if and when such a bona fide sale at a reasonable price is established. The lower court here adopted the contrary position, stating that "we think that *Brown* pre-

[23] The intimation in the Court of Claims' opinion that reasonableness should be tested without reducing deferred payments to present value through an imputed interest factor deserves no serious consideration. It is contrary to settled authority (see citations at p. 12, n.9, above), contrary to the valuation method used in *Brown* (380 U.S. at 572), contrary to economic theory (P. Samuelson, *Economics* 589-90 (8th ed. 1970)), and contrary to common sense: without adjustment to present value virtually every deferred payment contract—including, typically, the long-term home mortgage—would produce an unreasonable price since a large proportion of the total payment always represents interest, whether expressly stated or imputed.

sented a different factual context" and that "shifting of risk" is "relevant in a situation like that before us." App. 13b.

The only basis suggested by the lower court for distinguishing *Brown* was that the contract there allegedly involved a fixed price and payment period, whereas the present price and payment period are necessarily indefinite although both are subject to reasonable estimates. These considerations do not suffice to distinguish *Brown* even on factual grounds.[24] Moreover, the decisions of this and other courts show beyond possibility of dispute that the use of percentage payments and indefinite periods is entirely consistent with a sale transaction.[25] Above all, *Brown*'s rejection of risk-shifting as a mode of analysis was not grounded on the particular facts of that case but on the principled conclusion that under existing law risk-shifting is not the governing legal test.

The principle reaffirmed in *Brown* had and has great utility in the administration of the tax laws. It not only conforms to normal usage and existing practice but it provides a degree of certainty and simplicity in administration that can never be achieved by the risk-shifting approach. It is a comparatively straightforward matter to inquire, as the trial commissioner

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[24] There the time period, though the subject of an outer limit, was actually a variable period that would be shorter or longer depending on the actual future earnings of the business (380 U.S. at 567); and the alleged fixed character of the total payment was largely illusory because of the lack of any independent security apart from the business' own earnings. 380 U.S. at 567, 570.

[25] *Burnet* v. *Logan*, 283 U.S. 404 (1931); *Commissioner* v. *Ferrer*, 304 F.2d 125 (2d Cir. 1962); *United States* v. *Carruthers*, 219 F.2d 21 (9th Cir. 1955); *Tuttle* v. *United States*, 122 Ct. Cl. 1, 101 F. Supp. 532 (1961).

did here, whether there has been a bona fide sale, involving a significant economic change in position, a reasonable price, and a surrender of any claim to share in net income. It is quite another matter to explore each circumstance and financial ramification of an individual transaction in the microscopic detail required for a risk-shifting analysis, vastly prolonging the inquiry and virtually eliminating predictability. In any case, such an approach has not been sanctioned either by Congress or this Court.

Petitioner believes that, even by the touchstone of risk-shifting, the present transaction qualifies fully as a deferred payment sale and cannot fairly be regarded as leaving the former Bartolo stockholders with an interest "resembling" an equity interest.[26] The immediate question for certiorari purposes, however, is not whether the criteria were properly applied. It is whether the criteria should have been applied at all. We submit that, in light of *Brown*, the lower court acted in direct conflict with a governing decision of this Court, when it held that "shifting of risk" is "relevant in a situation like that before us." App. 13b.

The Court of Claims' opinion refers to a number of lower court decisions which it asserts support its ap-

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[26] For example, the transaction here, unlike *Brown*, was designed to require payments at a level sufficiently low that sellers would have the practical protection associated with a creditor's interest. See App. 75a. The trustees of Rose Hills were bound to operate it as a public trust and the trial commissioner and the Court of Claims both found that they were faithful to their obligations. See App. 50a, 43b. In the event of dissolution of the cemetery, the former Bartolo stockholders would not be entitled to an equitable owner's share of remaining assets. These and similar considerations are not consistent with the Court of Claims' conclusion even within its own self-defined boundaries.

proach in the present case. It cites, first, several of the conventional "thin-capitalization" cases such as *Gilbert* v. *Commissioner*, 248 F.2d 399 (2d Cir. 1957), *cert. denied*, 359 U.S. 1002 (1959). These cases normally do not involve the disposition of property at all; typically, the question is whether a cash advance by a controlling stockholder of a small corporation should be classified as a loan or an investment. This Court's decision in *Brown* establishes that the approach of these cases is simply inappropriate where there has been a disposition of property by sale.

The lower court says, however, that "five Circuits and the Tax Court" have held various types of percentage payment rights, arising from the sale of land to cemeteries, to be equity investments. App. 7b.[27] *None* of the cited Circuit cases involved non-profit cemeteries litigating their exempt status and none of them sought to construe or apply Section 501(c)(13) or any of its predecessors. The Circuits' "holdings" on the various issues actually presented are far from helpful to the lower court here even by analogy: two (the *Jefferson* and the *Hamilton* decisions) did not reach any issue relevant here (see App. 7b); another (*Gardens of Faith*) is a one-paragraph, pre-*Brown* decision which does not purport to examine any issues of law; a fourth case (*Sherwood*) involved an issue of deductibility and the decision carefully distinguished

[27] The cited cases were *Gardens of Faith, Inc.* v. *Commissioner*, 345 F.2d 180 (4th Cir.), *cert. denied*, 382 U.S. 927 (1965); *Sherwood Memorial Gardens, Inc.* v. *Commissioner*, 350 F.2d 225 (7th Cir. 1965); *Peterson* v. *Commissioner*, 380 F.2d 1 (9th Cir. 1967); *Jefferson Memorial Gardens, Inc.* v. *Commissioner*, 390 F.2d 161 (5th Cir. 1968); *Hamilton Memorial Gardens* v. *Commissioner*, 394 F.2d 905 (6th Cir.), *cert. denied*, 393 U.S. 936 (1968); *Knollwood Memorial Gardens* v. *Commissioner*, 46 T.C. 764 (1966).

Kensico as involving a non-profit, exempt cemetery; and the fifth (*Peterson*), which concerned capital gains treatment, relied on *Sherwood*.

Only the Tax Court decision—*Knollwood Memorial Gardens*—involved the present question whether a deferred payment, percentage-based land sale to an exempt cemetery resulted in an inurement of net earnings to the sellers and so deprived the cemetery of its exemption.[28] In holding that such an inurement had occurred in that case, the Tax Court relied heavily upon the unreasonableness of the sales price, and this reading of the decision renders it consistent with *Brown*.[29] On this reading, the case does not support but impugns the Court of Claims' decision here, since the reasonableness of the sales price in this instance was proved beyond legitimate dispute.

III. The Lower Court's Decision Conflicts With United States v. Byrum, 408 U.S. 125 (1972), in Disregarding Long-standing Judicial Precedents Properly Relied Upon by Petitioner and Other Cemeteries in Framing Their Transactions.

The final independent ground for review by this Court is the conflict between the principles set forth in

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[28] In *Knollwood*, a newly organized cemetery acquired from its developer raw farmland worth $6,000 and the developer made improvements for about $7,500. In exchange, the cemetery committed itself to make continuing percentage payments which, *within the next 18 months alone*, brought the developer and his assigns over $52,000. 46 T.C. at 770-75. Under these terms the purchase price was excessive and unreasonable under any proper method of valuation.

[29] As the Court there stated: "We do not have, therefore, a case where the price has been found excessive." 380 U.S. at 573. See *Louis Berenson*, 59 T.C. 412, 421 (1972), where the Tax Court recently confirmed that the reasonableness or unreasonableness of the purchase price is a controlling consideration under *Brown*.

this Court's decision in *United States* v. *Byrum*, 408 U.S. 125 (1972), and the decision below. In *Byrum* this Court emphasized the importance of adhering to established judicial precedents in construing the Internal Revenue Code where taxpayers may reasonably have relied upon outstanding constructions and where Congress can better effect changes in existing law where they may be appropriate.

When the present transaction was accomplished in 1952, all parties to it had a sound basis for believing that the construction of the cemetery exemption provision adopted in *Commissioner* v. *Kensico Cemetery*, 96 F.2d 594 (2d Cir. 1938), would continue unless and until Congress saw fit to change it. The Government cannot reasonably dispute that the transaction in the present case was modeled upon the conventional method used in cemetery financing for many years and held consistent with the cemetery exemption statute in *Kensico*. As already noted, the holding of *Kensico* was followed in the successive *Forest Lawn* cases by the Board of Tax Appeals in 1941 and by the Tax Court in 1946. Until the decision here sought to be reviewed, no court had held that the deferred payment, percentage contract, where the amounts paid were reasonably related to the value of the property, worked a forfeiture of a cemetery's exemption.

Not only did the three judicial decisions directly in point sustain the prior construction, but the Commissioner after a brief period of non-acquiescence in two of the decisions had finally acquiesced in *Forest Lawn* in 1946. 1946-2 Cum. Bull. 2. Thus, the Commissioner's own acquiescence had been in effect for approximately seven years and constituted the type of administrative construction which the Commissioner himself frequent-

ly urges the courts to accept as deserving of heavy weight in the construction of the tax laws. That acquiescence is significant, at the very least, in confirming that the construction of the statute relied on by the petitioner here was the accepted construction when the transaction occurred.

This Court explained in *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 281 (1966), that "although we recognize such an acquiescence does not in and of itself commit the Commissioner to this interpretation of the law, it is a significant addition to the already convincing array of authority showing the Commissioner's consistent prior position." There, as in the present case, the Commissioner had acquiesced only after fighting and losing the issue in court; and the acquiescence had continued for fourteen years until it was withdrawn by the Commissioner when he adopted the position he was defending in *Fribourg*. 383 U.S. at 280-81. In rejecting the Commissioner's new position, this Court relied heavily upon the pre-existing precedents. 383 U.S. at 279-83.

The issue presented here is not whether the Commissioner could permissibly alter his prior position and argue that *Kensico*, the *Forest Lawn* cases and his own acquiescence were erroneous.[30] The immediate question is whether the Court of Claims erred in its own construction of Section 501(c)(13) by refusing to accord

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[30] Petitioner believes that in this case the Commissioner's about-face disavowal of his own earlier, formally expressed position and his retroactive withdrawal of petitioner's exemption were arbitrary and an abuse of discretion on any sound view of what the law is or should be. See generally *Dixon* v. *United States*, 381 U.S. 68 (1965). That, however, is a different issue than the legal question, discussed in the text, whether under *Byrum* the lower court should have adhered to existing precedent.

proper weight to prior judicial precedents on which the petitioner had reasonably relied and which Congress had not seen fit to alter in the course of numerous amendments to the exemption provisions of the Code. In this instance, the attitude of the lower court toward existing precedents cannot be squared with what this Court said in *United States* v. *Byrum*, 408 U.S. 125 (1972).

Byrum represents this Court's most recent and emphatic pronouncement concerning the role of *stare decisis* in the tax law. In that case the decision stated that the transaction in question had been structured in accordance with the rules laid down by earlier judicial decisions from which the Commissioner sought to depart in *Byrum*. In considering the weight to be accorded those earlier decision this Court said:

> "Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned. Legislative enactments, on the other hand, although not always free from ambiguity, at least afford the taxpayers advance warning." 408 U.S. at 135.

The Court also observed that it was less concerned with whether the particular taxpayer had in fact properly relied on the precedents than with the "probability" that taxpayers generally had relied on the precedents in good faith. 408 U.S. at 134 n.8.

Byrum is not the only decision of this Court to acknowledge the importance of *stare decisis* in tax law and the adverse effects of departing from settled principles after taxpayers have acted in reliance upon them. The same emphasis on *stare decisis* and justified reliance was suggested in the Court's opinion in *Brown*. The Court there emphasized that "risk-shifting of the kind insisted upon by the Commissioner has *not heretofore* been considered an essential ingredient of a sale for tax purposes," and concluded that the Commissioner's position would have "wide ramifications which we are not prepared to visit upon taxpayers, in the absence of congressional guidance in this direction." 380 U.S. at 574-75 (emphasis added).

The principle asserted by the majority in *Byrum* was not questioned by the dissenters in that case. The dissenting opinion took note of the majority's "principle that courts should refrain from decisions detrimental to litigants who have taken a position in legitimate reliance on possibly outdated, but once established, case law." 408 U.S. at 162. The dissent argued that the principle did not properly apply on the facts of *Byrum* because the prior decisions assertedly relied on by the taxpayer were, in the dissent's view, remote at best and thoroughly eroded by intervening decisions at the time of the the taxpayer's transaction. Indeed, the Government itself in *Byrum* urged reliance on *stare decisis* principles, based on its own interpretation of existing case law as supporting the Government's position on the merits.[31]

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[31] The Government stated: "In sum, then, we agree with respondents and *amici* that this case calls for application of the doctrine of *stare decisis*." Reply Brief for the United States, p. 7, *United States* v. *Byrum*.

Whatever question may have existed in *Byrum* about the state of the decisional law when the taxpayer acted certainly does not exist in this case. No credible basis exists for distinguishing *Kensico* and the *Forest Lawn* decisions, and when Rose Hills made its acquisition in 1952 the Commissioner's own acquiescence in *Forest Lawn* was still in effect. The main Government response to *Kensico* and the *Forest Lawn* decisions has been to assert in the court below that they are "outmoded" today and should not be followed. Brief and Exceptions for the United States, p. 49.

Byrum was decided on June 26, 1972, while the present case was pending before the Court of Claims. The decision was promptly called to the court's attention by a memorandum filed by Rose Hills; possibly because its opinion was already drafted, the court refused permission to file the memorandum on July 14, 1972, at the same time as it issued the opinion here sought to be reviewed. The denial was without prejudice to renewal of the same point by petition for rehearing. When the petition was filed, the lower court denied it without any explanation or attempt to reconcile *Byrum* with the results reached in this case. App. 1c.

The Court of Claims' failure to follow the principle stated in *Byrum* or even to attempt to explain why the principle should not be followed in this case is not a permissible treatment of a recent, governing decision of this Court. The lower court's decision here not only scants *Byrum* but disregards the policies embodied in it which properly play an important role in the operation of the tax laws. Tax is a highly counseled field in which financial transactions must be planned in reliance on existing rules. Many statutory questions can plausibly be decided either way and a dominating need

is for certainty. The continuing congressional attention to tax matters provides a means by which changes can be effected in existing law while at the same time protection is given to legitimate earlier reliance. Accordingly, there are few areas in which *stare decisis* principles deserve so much weight.

The reliance element is especially important in cases such as this one involving long-term obligations incurred by exempt organizations. The petitioner here is a cemetery that is the burying place of approximately 100,000 persons and has been operated faithfully as a public trust ever since its establishment. App. 50a, 72a, 43b, 62b. The financial obligations Rose Hills has incurred in acquiring its property are binding upon it whether or not it remains exempt. Its payment obligations are feasible so long as its exempt status continues and were, indeed, properly fixed on this assumption.

The sudden imposition of a quarter million dollars a year in tax liability on a continuing basis cannot fail to have the most serious effect upon the operation of the cemetery by depleting funds until now available for maintenance, improvement and other purposes wholly in accord with the exemption statute and Congress' intent. In addition to the nearly quarter million dollars in taxes relating to fiscal 1965, the Commissioner's proposed deficiencies and interest relating to past open years will amount to literally millions of dollars. The Commissioner will, of course, take the position for all future years that Rose Hills is not entitled to its exemption even though its payment obligations to the former Bartolo stockholders continue.[32]

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[32] As the present case illustrates, the impact of the decision below is likely to fall most heavily upon completed transactions, such as the present one, rather than upon those which lie in the

In considering this reliance element it is important to recognize that the Government is not merely contending for a different rate of tax on a particular item of income, as in a dispute over capital gains treatment, or differing about a question of deductibility of a given expense item. Rather, the consequence of the decision below is to deprive the petitioner of its federal tax exemption in all respects and to subject all of its revenues to federal income taxation. These include substantial revenues which petitioner derives from activities other than the resale of its land as well as substantial revenues from such resales which are unquestionably expended on the maintenance and improvement of the cemetery, precisely as Congress intended in creating the exemption. The visiting of these extreme consequences is an additional reason why the *Byrum* principle deserves respect in this instance.

A concluding factor which has a special force in this case is the presence of congressional review. As this Court explained in *Commissioner* v. *Brown*, rejecting the Commissioner's invitation to disregard long-standing precedent and break new ground, Congress in the Revenue Act of 1950 (64 Stat. 947-60) devoted substantial attention to business operations carried on by tax-exempt entities. See 380 U.S. at 563, 578-79. It also returned to the same area and instituted other changes in the Tax Reform Act of 1969. 83 Stat. 492-549. If at either time the Commissioner had wished to do so, he could have sought Congress' approval for a

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future and can yet be structured differently or abandoned. *Cf.* the concurring opinion of Mr. Justice Harlan in *Commissioner* v. *Brown*, *supra*, 380 U.S. at 580. Thus, the parties whose reliance has been most justified are those most injured by the judicial revision of existing rules.

change in Section 501(c)(13) to alter the construction adopted in *Kensico* and the *Forest Lawn* cases.

Even if Congress had been persuaded that the deferred payment, percentage contract should be forbidden to exempt cemeteries it can scarcely be conceived that it would have applied this determination retroactively or made no provision for contracts made in reliance upon existing law. Unlike the courts, Congress has the precise tools required to alter constructions of tax statutes now deemed undesirable in ways that protect legitimate reliance interests and prevent surprise forfeitures. This alternative course—which the Commissioner has not sought to pursue—underlines the wisdom of *Byrum* and the error of the lower court in departing from that decision.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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May 1973

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72-1518
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

ROSE HILLS MEMORIAL PARK ASSOCIATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF TRIAL COMMISSIONER, MAY 24, 1971 ..... 1a

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF COURT OF CLAIMS, JULY 14, 1972 ..... 1b

ORDER OF COURT OF CLAIMS ON MOTION FOR REHEARING, DECEMBER 12, 1972 ..... 1c

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 376-66

(Filed May 24, 1971)

ROSE HILLS MEMORIAL PARK ASSOCIATION

v.

THE UNITED STATES

REPORT OF THE COMMISSIONER TO THE COURT *

John H. Hall, attorney of record, for plaintiff. *Dana Latham, Austin H. Peck, Jr., William A. Long*, and *Latham & Watkins*, of counsel.

Ira Mark Bloom, with whom was *Assistant Attorney General Johnnie M. Walters*, for defendant. *Philip R. Miller*, of counsel.

Opinion

WILLI, *Commissioner:* Plaintiff was organized in 1950 under Part 1, Division 2, Title 1, Section 9200 of the California Corporation Code [1] as a non-profit cemetery corpo-

* The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 134(h).

[1] Sec. 9200 provides:

Lawful purpose without distribution of gains, profits, or dividends; incidental business for profit. A nonprofit corporation may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits or dividends to the members thereof and for which individuals lawfully may associate themselves, such as religious, charitable, social, educational, or cemetery purposes, or for rendering services, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines

ration with bylaws vesting all corporate powers in a board of trustees (findings 1, 15).[2]

The overriding issue in this tax refund suit is whether plaintiff qualifies for exemption from federal income tax under section 501(c)(13) of the Internal Revenue Code of 1954.[3]

Since November 1, 1950, plaintiff has operated a memorial park-type cemetery near Whittier, California, and about 12 miles east of the center of downtown Los Angeles. A cemetery was first established at this location in 1915 and has continuously operated there ever since. The details of the ownership, development and substantial en-

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of activity. Carrying on business at a profit as an incident to the main purposes of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations, but no corporation formed or existing under this part shall distribute any gains, profits or dividends to any of its members as such except upon dissolution or winding up.

[2] The parties have stipulated that California law prohibited plaintiff from issuing stock and that, in fact, none was issued. (Finding 1, *infra*.)

[3] Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

* * * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * * *

(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * * * *

largement of what has become the largest single-tract cemetery in the United States are charted in the findings of fact accompanying this opinion. (Findings 3-23, *infra*.) Factual repetition here will be limited to the necessities of the holdings to follow.

On August 27, 1952, in response to plaintiff's request of February 19, 1952, the Internal Revenue Service ruled that plaintiff qualified as an organization exempt from federal income tax under section 101(5), the 1939 Code counterpart to section 501(c)(13) of the 1954 Code. In 1964, the Service revoked its earlier ruling and pronounced plaintiff a taxable entity. Plaintiff thereupon filed a return for its 1965 fiscal year, paid the resulting tax, and filed a claim without avail, and ultimately brought this suit.

Aside from the question of whether plaintiff's operation of a mortuary in conjunction with its cemetery deprives it of tax-exempt status,[4] the exemption issue, as framed by the parties, hinges on the nature of the 1952 transaction by which plaintiff acquired the bulk of its cemetery property, aggregating approximately 2,200 acres—an area capable of providing grave spaces for almost 2½ million persons. Whereas plaintiff contends that the transaction was a deferred payment sale of land, the Government insists that it was a contribution to plaintiff's capital by the former land owners, thereby constituting their subsequent receipts dividends and, as such, an embodiment of the inurement of "net earnings" proscribed by the exemption statute.

In 1952, the cemetery and surrounding lands were owned by Bartolo Company, the last in a series of for-profit corporations with generally common ownership that had begun and expanded cemetery operations on a portion of the property; approximately 265 acres having been legally dedicated to cemetery use by December 1952. All of the land has since been so dedicated.

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[4] *See* Rev. Rul. 64-109, 1964-1 Cum. Bull. (Part 1) 190.

By an agreement of December 26, 1952,[5] effective December 1, 1952, plaintiff acquired all of the issued and outstanding shares of Bartolo [6] in return for its promise to pay the former shareholders 30 percent of future grave sales (net of endowment care fees), 20 and 25 percent on multiple and single underground crypt sales, respectively, and 10 percent on sales of mausoleum crypts and niches. These percentage payments are subject to no periodic minimum. They are due only after plaintiff has received full payment from its customers and they constitute the only consideration due the shareholders under the agreement. Thus, those former shareholders have no participation in plaintiff's substantial and progressively increasing revenues from interments, markers, vaults, mortuary services, and all other miscellaneous products and services offered for sale. The 1952 agreement gave the sellers no participatory interest in plaintiff's net income in any event.

Though the record in this case is extensive, classification of the 1952 transaction as a sale almost inevitably follows from a relatively few factual propositions as to which there is no real conflict in the evidence.

Foremost among such propositions is the solidly supported 1952 fair market value of the property sold by the Bartolo shareholders. All of the valuation evidence offered on this point was adduced by plaintiff. That evidence established that, valuing only the 192 acres of salable dedicated land on the basis of future cemetery use and all of the balance for immediate subdivision and commercial purposes, the property had a fair market value of not less than

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[5] Because the agreement is at the forefront of the controversy, it is set out in full at finding 26, *infra*.

[6] Plaintiff bought the Bartolo stock for the purpose of acquiring the company's underlying assets. Consistent with this purpose, plaintiff liquidated Bartolo as soon as California law permitted the liquidation without incurrence of state income tax liability thereon. (Findings 55 and 56, *infra*.)

$10,452,000. (Findings 32-36, *infra.*) This value is the standard of comparison for appraising the relative reasonableness of what the sellers received in return.

Second, while it is true that the 1952 agreement specifies no cutoff date or absolute dollar limit for payments to the former Bartolo shareholders, the physical dimensions of the property create a reasonably determinate ceiling on the number of graves that can be sold. Thus, the uncontradicted evidence is to the effect that under normal cemetery practice, an acre of land will yield 1135 graves. (Finding 33, *infra.*) This means that in the instant case there is a maximum sales potential of 2,499,000 graves. Further, the evidence established the firm probability that these graves would be sold at a sustained average rate of 12,500 per year. (Finding 33, *infra.*) The interrelationship of these two figures produces a projected revenue life span under the agreement of 200 years for the former Bartolo shareholders. Moreover, since plaintiff's evidence, again unchallenged by the Government, tended to prove a reasonably stabilized selling price of $160 per grave, with crypt and niche sales consistently approximating 7 percent of annual grave sales, a total revenue figure of $123,000,000[7] for the agreement was proved. (Findings 37 and 38, *infra.*)

Probably the most significant background factor to be considered in ascertaining the substance of the 1952 transaction is that pertaining to plaintiff's obvious need to obtain credit from its land supplier.

Newly-formed cemetery corporations, the evidence showed, are typically unable to secure credit from conventional lending agencies primarily because of the long-term

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[7] Though on its face this figure seems monumentally large, it should be remembered that it represents an aggregation of monies to be received at a basically constant rate over a 200-year period. The impact of the time span involved can be gathered from the fact that at a 7 percent simple interest rate, the present value of $1,000,000, 200 years hence, is $1.33.

character of land inventory liquidation and the difficulties presented in qualifying legally dedicated cemetery land as suitable collateral in the hands of a third-party lender. (Findings 27 and 28, *infra.*)

These borrowing problems logically led to the emergence of the cemetery land sale contract, wherein a cemetery purchases land through the use of deferred payments based on a percentage of the proceeds derived from subsequent lot or gravesite sales. Many of these contracts are variable price contracts, having no fixed dollar total purchase price. *See, e.g., Commissioner* v. *Kenisco Cemetery,* 96 F. 2d 594 (2d Cir. 1938), *aff'g* 35 B.T.A. 498 (1937), *nonacquiesced in,* 1937-1 Cum. Bull. 40; *Forest Lawn Memorial Park Association, Inc.,* 45 B.T.A. 1091 (1941), *nonacquiesced in,* 1942-2 Cum. Bull. 25, *withdrawn and acquiesced in,* 1946-2 Cum. Bull. 2, *withdrawn and nonacquiesced in,* 1960-2 Cum. Bull. 8.

In noting the early and continued sanction of such cemetery land sale contracts, the California Supreme Court in *Westminster Memorial Park* v. *County of Orange,* 354 P. 2d 247, 252 (1960), explained:

> It must be remembered that the type of contract here in use was not a device dreamed up by the respondent and the sellers as a means of avoiding taxes. This type of contract is well-known to the law, and has been used in the cemetery field for many years. It has been in use in California at least since 1880. * * *

In sum, the evidence shows that in substance plaintiff bought two things from the Bartolo shareholders; the land needed to commence and sustain its planned operation of a truly large-scale cemetery and the credit necessary to permit deferral of payment for that land until it had been resold and fully paid for by the ultimate purchasers of grave spaces, crypts and niches. (Ultimate finding 79, *infra.*)

Once it is recognized that the substance of the 1952 transaction found plaintiff buying two things; land and the long-term credit necessary to finance it, the remaining determination becomes that of a reasonable charge [8] for the credit obtained. It is concluded that under all of the circumstances present in this case a reasonable rate for plaintiff's use of the former Bartolo shareholders' resources,[9] *i.e.*, the fair market value of the property with which they parted, is 7 percent per annum. (Finding 31, *infra.*) That rate is in accord with the unchallenged testimony of plaintiff's valuation expert with appropriate adjustment to reflect the fact that as plaintiff's trustees, the former Bartolo shareholders were in a position to exercise such supervision and control over its affairs as to reasonably safeguard their legitimate creditors' interest. (Findings 30 and 31, *infra.*) Notably, the evidence showed that such control was only exercised to the extent and in a manner appropriate to that limited objective.

Applying the same annuity method of capitalization expressly sanctioned by this court in a similar situation,[10] the 1952 value of the Bartolo shareholders' right to future receipts under their agreement with plaintiff was $6,951,583. (Findings 37-40, *infra.*) This figure represents a fair approximation of what the Bartolo shareholders received in

---

[8] The 1964 adoption of what is now section 483 of the 1954 Code was designed to create a *conclusive* imputation of interest in deferred payment transactions meeting certain criteria but silent as to interest charge. 3B Mertens, *Law of Federal Income Taxation* (Rev.) § 22.46a. This does not mean that such silence prior to the enactment *foreclosed* the imputation of interest in a deferred payment situation with facts indicating that a purchase of credit was intended. *See*, for example, *Estate of Hedrick* v. *Commissioner*, 406 F. 2d 587 (9th Cir. 1969).

[9] *United States* v. *Koppers Co.*, 348 U.S. 254, 267 (1955).

[10] *McCormac* v. *United States*, 191 Ct. Cl. 483, 500, 424 F. 2d 607, 620 (1970).

terms of 1952 value for the $10,452,000 worth of property that they gave up.

Defendant cites a number of cases with some factual similarities to the transaction here in question, wherein courts have declined to recognize a purported sale as such, and treated the proceeds as dividends to the transferors. *Gardens of Faith, Inc.*, 23 CCH Tax Ct. Memo. 1045 (1964), *aff'd per curiam*, 345 F. 2d 180 (4th Cir. 1965), *cert. denied*, 382 U.S. 927 (1965); *Sherwood Memorial Gardens* v. *Commissioner*, 350 F. 2d 225 (7th Cir. 1965); *aff'g* 42 T.C. 211 (1964); *Peterson* v. *Commissioner*, 380 F. 2d 1 (9th Cir. 1967).

The critical distinguishing characteristic of this case is, as stated at the outset, the well-documented value of the property surrendered by the former Bartolo shareholders. Defendant cites no case, and research has failed to disclose one, where a court has denied the existence of a sale albeit the value of what the transferor gave up was equal to or more than what he received in return.

The controlling significance of a reasonable purchase price, or payments reasonably related to value, to a finding of bona fide sale was emphasized in *Knollwood Memorial Gardens*, 46 T.C. 764 (1966), the only case in which a transfer to a purported nonprofit cemetery corporation was held not to be a sale, but rather the acquisition of an equity interest. In *Knollwood*, undeveloped land was transferred to a nonprofit organization, the purchase price being percentage payments from future sales greatly in excess of the value of the land when transferred. In denying that a sale had taken place, the Tax Court stated in part:

> * * * When, as here, the alleged "purchase price" bears no reasonable relationship to the fair market value of the assets conveyed, it is stretching normal definition beyond its breaking point to regard the transaction as a sale. * * * [46 T.C. at 783.]

And in speaking more broadly about the relationship between reasonable price and sale characterization, the Tax Court observed:

> * * * It is possible that in the case of * * * other cemeteries * * * the landshare method could fairly be regarded as in substance a sale. The payments to be received by the landshare holders might well be in line with the fair value of the land conveyed. Such might have been the situation in the instant case, for example, if the market value of the land conveyed to the cemetery had been greater. * * * [46 T.C. at 784, n. 5]

There were, of course, earlier precedents in which arrangements similar to that involved here were recognized as sales. *Commissioner* v. *Kenisco Cemetery, supra; Forest Lawn Memorial Park Ass'n, supra.*

In addition to its bearing on the question of whether or not the 1952 transaction was in reality a sale, the fact that the agreement's appropriation of the entire Bartolo property to cemetery usage did not enhance the market value that it had in 1952 wholly independent of that agreement clearly indicates that this was not the kind of transaction that Congress had in mind as causing forfeiture of a cemetery corporation's tax exemption because of inurement of its earnings to a shareholder or other individual.

Section 501(c)(13) of the 1954 Code originated in substantially its present form in the Revenue Act of 1921, ch. 136, 42 Stat. 227, § 231(5). That cemetery operations since that time have undergone such a drastic change in fundamental character and substantial increase in economic scale as to suggest the desirability of a reconsideration and revision of applicable taxing provisions may be matters that Congress should consider. Such factors do not bear relevantly, however, on a resolution of the present controversy which must be determined by the statutory criteria that

presently exist. *Commissioner* v. *Brown*, 380 U.S. 563, 579 (1965).

Prior to the 1921 Act, the only income tax exemption for cemetery companies was for those described in the first part of section 501(c)(13); namely, those "owned and operated exclusively for the benefit of their members." Revenue Act of 1918, ch. 18, 40 Stat. 1057, § 231(5); Revenue Act of 1916, ch. 463, 39 Stat. 756, § 11(a).[11]

As the bill which became the Revenue Act of 1921 was reported to the Senate, section 231(5) merely readopted the identically numbered section of the Revenue Act of 1918 granting exemption to cemeteries owned and operated exclusively for their members. But Senate floor amendments expanded the exemption in two different respects.[12]

First, there was the essentially non-controversial matter of broadening the limiting qualification of exclusive membership benefit.

Senator Pomerene of Ohio proposed an amendment adding the language "or which are not operated for profit" to the existing provision. He explained his proposal as follows (61 Cong. Rec., Part 7, p. 7489):[13]

> Mr. Pomerene. Mr. President, will the Senator yield?
> Mr. Smoot. Yes.
> Mr. Pomerene. The Senator has just called attention to the language of the amendment as it was adopted

[11] The 1916 Act changed the language from the original version in the Income Tax Act of 1913, ch. 16, 38 Stat. 114, 166, § IIG(a)—"cemetery companies, organized and operated exclusively for the mutual benefit of their members."

[12] A comprehensive discussion and analysis of the subject of cemetery exemption with particular emphasis on the 1921 legislation may be found in 44 Taxes, Tax Magazine, 744 (1966).

[13] All italics that appear in the excerpts of debate that follow have been added for emphasis.

some days ago. I think at the time I referred to this language. I think it ought to be amended in one respect to which I shall now refer. It reads:

"Cemetery companies owned and operated exclusively for the benefit of their members."

I have in mind a cemetery in my own city which is operated for the benefit of its members, but not exclusively so; that is, they have a potter's field where they bury paupers or those who are not able to pay their burial expenses. I am afraid that under the definition as it is here, that cemetery might be subject to this tax. I do not think it ought to be.

Mr. Smoot. Does the Senator mean that they take cases that are destitute, and that fall under the provisions of a city charter, and the city pays the expense?

Mr. Pomerene. It is not a city charter; it is chartered by the State, but it is a city cemetery. Under the provisions of their charter they take the proceeds of the sale of these lots and they use that as an endowment fund to beautify and keep in repair the cemetery, and in addition to that they bury paupers or others who are in destitute circumstances.

Mr. Smoot. *But it is not for profit?*

Mr. Pomerene. *Oh, no; not a dollar is profit.*

Mr. Smoot. Then I would not care if that were exempted.

Mr. Pomerene. There has never been any dividened. I know one of the leading business men who was the president of this association for 25 years or more. It was a sort of a hobby with him. He gave his time to it, and took an interest in it. He never got a dollar's profit out of it.

Thus, it is seen that the inclusion of membership corporations "not operated for profit" was not intended to materially increase the area of exemption. Clearly, it was

not intended to embrace operations, such as plaintiff, offering burial services to the general public on a commercially competitive basis.

The second and far more important statutory change for present purposes was the outgrowth of an amendment jointly sponsored by Senators McKellar of Tennessee and Williams of Mississippi, who felt that tax exemption should not be limited to non-commercial membership cemeteries and proposed that it be extended to profit-making companies as well, provided only that the stockholders be required to pay tax on the dividends that they received. The amendment was stated as follows (61 Cong. Rec., Part 7, p. 7487):

> The Assistant Secretary. The committee amendment reads as follows:
>
> (5) Cemetery companies when operated exclusively for the benefit of their members:
>
> It is proposed to add, after the word "members" and the colon, the words:
>
> *Provided,* That any incorporation chartered solely for burial purposes as a cemetery incorporation and not permitted by its charter to indulge in any business not necessarily incident to that purpose, shall be exempt from taxation upon its income, but nothing in the foregoing shall exempt shareholders individually in such corporation from taxation upon any dividend or distribution accruing to them from profits made by the corporation. Such incorporations shall be exempt from corporation tax upon their capitalization.

By the debate that followed and produced the compromise legislation ultimately adopted, in the form of § 501(c)(13) as it now appears, Congress clearly manifested its intent in at least two areas that are of fundamental importance to a

decision in this case. First, the legislators were obviously sensitive to the possibilities for inflating the value of land simply by appropriating it to cemetery use. They were unanimous in deploring such practices and in their determination that the profits reaped from appreciation of that sort not go untaxed. Second, with equal unanimity the legislators indicated that they were satisfied to extend tax exemption to cemeteries that realized operating profits provided, however, that such profits were retained in the corporation and assuredly used for the care and betterment of the cemetery property. The announced test for exemption, then, was clearly not whether profits were made but what was done with them; specifically whether such profits inured to the benefit of individuals rather than accruing to the cemetery as an institution.

The following portions of debate reveal the intended thrust of the McKellar-Williams proposal, including the stated prohibition against an exempt cemetery corporation engaging in any business "not necessarily incident to * * * burial purposes"; the basis of the opposition to the proposal and, finally, the intended meaning of the compromise provision that was enacted and has endured to the present (61 Cong. Rec., Part 7, pp. 7487-7490):

> Mr. McKellar. Mr. President, I merely desire to make a brief explanation of the amendment.
>
> In former days cemetery companies were not conducted as they are now. Take my State, for instance. We have there a statutory law under which cemeteries are made substantially charitable organizations in this way: The law provides in the State of Tennessee that one-fourth of all the cash proceeds of the cemetery company shall be applied to a trust fund and that trust fund is to be used for the perpetual upkeep of the cemetery. To tax these quasi charitable corporations, it seems to me, is a very great hardship. Under the laws of Tennessee—and I think the laws of certainly

nearly all other States have a similar provision—cemeteries are exempted from all State taxation, and very properly so, because a cemetery is substantially a State institution.

We tax, I think, nearly everybody in this bill; we tax nearly everyone's income; we tax his property and in many instances we tax the property when it passes from the decedent to his next of kin or to his heirs. It seems to me that surely we might stop at the grave and not tax the grave after the dead have been put away.

In a very able and learned judicial opinion my colleague, the senior Senator from Tennessee [Mr. Shields] once held that taxes ought to stop at the grave, and that the grave should not be so desecrated.

So I am asking the Senate to agree to this amendment. *Mind you, if any profits are made it is provided by the amendment that they shall be taxed as profits; the profits and dividends are made taxable, just as is the income of any individual.*

Mr. Walsh of Montana. Mr. President, let me inquire of the Senator: *That is in the hands of the stockholder?*

Mr. McKellar. In the hands of the stockholder.

Mr. Walsh of Montana. After the distribution?

Mr. McKellar. *Yes.*

* * * * * * * * * *

Mr. McKellar. * * * If the Senate feels that it should tax the incomes of these cemetery companies, a large portion of which is required to be invested so as to keep up the cemeteries perpetually, which ought to be done, of course, it can do so; but I say that there ought not to be a tax placed on them. The taxes are burdensome, and I do not think they should be imposed, and I ask that that may not be done.

Mr. Spencer. Mr. President, may I ask the Senator a question?

Mr. McKellar. Surely.

Mr. Spencer. *Would the Senator have any objection to adding to his amendment, after the word "incorporation," the words "whose stockholders receive no dividends"?*

Mr. Williams. That is in it.

Mr. Spencer. No; that is not in it. In other words, as I recollect the Senator's amendment as it was read, a cemetery company that does pay dividends to its stockholders would be exempt from taxation under the Senator's amendment. Now, *everybody knows that where a corporation buys land by the acre and sells it by the square foot there is a profit that is simply phenomenal;* and if that profit goes to the stockholders, of course, the cemetery company ought to pay a tax. *If that profit goes to the beautification of the cemetery, then I agree with the Senator from Tennessee.*

Mr. McKellar. I will say to the Senator that under the laws of Tennessee one-fourth of all the profits is taken out and put in a trust fund for the perpetual keeping up and beautification of the cemetery itself.

Mr. Spencer. Then the Senator would have no objection to adding to his amendment, after the word "incorporation," the words "whose stockholders receive no personal advantage"?

Mr. McKellar. Oh, no; I do not think that should be done. I think a man who will use his land or my land and invest one-fourth of the profits in the perpetual beautification of a graveyard or cemetery is entitled to the greatest credit in the world and ought to be allowed to make some profit. In the case of one of the cemetery companies of which I happen to know and to which my attention has been called, my recollection is that there has been 15 per cent made in the last 32 years. I think that is a very, very small income. They have had to pay taxes on that as other people pay taxes

on their income, and I think that is a very, very small income.

Mr. Spencer. I agree with the Senator from Tennessee; that is a very small profit; but under the Senator's amendment it would be quite possible for that corporation to pay a thousand per cent dividend a year and still have it exempt from taxation.

Mr. McKellar. It would be possible, but not probable. It never has been done, and I doubt if it ever will be done.

* * * * * * * * *

Mr. Smoot. Mr. President, I want the Senate to notice that the provision that has already been adopted by the Senate goes this far:

"Cemetery companies owned and operated exclusively for the benefit of their members."

There is no tax whatever upon such a cemetery, and the proposition made by the Senator from Tennessee simply means this: *Half a dozen men in any city can form themselves into a company. They can go out upon some hill; they can buy the land at a nominal value per acre; they can sell that land in graveyard lots, and at such a price that after two or three years, when perhaps a quarter of the land is sold, nearly every sale of the lots thereafter is clear gain.* I know of cities in the West where I think they have been the most profitable investments that I know of; and not only that, but they take only a part of the interest that they draw upon the gains to take care of the lots.

* * * * * * * * *

Mr. Williams. Mr. President, it is very well now and then to recur to the topic of conversation and to the real question before anybody. This amendment reads:

"*Provided*, That any incorporation—"

I ask the attention of the Senator from Utah to this—

"*Provided*, That any incorporation *chartered solely* for burial purposes as a cemetery incorporation *and not permitted* by its charter *to indulge in any business not necessarily incident to that purpose* shall be exempt from taxation upon its income, but nothing in the foregoing shall exempt shareholders individually in such corporation from taxation upon any dividend or distribution accruing to them from profits made by the corporation. Such incorporations shall be exempt from corporation tax upon their capitalization."

Mr. Smoot. *That simply means that a corporation, for instance, doing a wholesale dry-goods business can not start one of these other corporations in connection with it and be exempt from taxation.* That is not the way they do it. The organization of these cemetery companies is for the purpose of carrying on the business of the cemetery company, and that simply identifies them. I do not know of a single cemetery company that is running in connection with another corporation. They are corporations by themselves.

Mr. Williams. Mr. President, this amendment has nothing to do with the dry goods business. It has nothing whatever to do with any other sort of business except a cemetery business. It says:

"That any corporation chartered solely for burial purposes as a cemetery incorporation—"

* * * * * * * * *

Mr. McCumber. Mr. President, I want the attention of the Senator from Tennessee who offered this amendment. *I am quite certain that the Senator from Tennessee does not desire that a corporation which was organized and purchased some beautiful spot for a cemetery for $10,000 in acreage, and immediately sells burial lots for $200,000, should be excused from paying*

a tax upon the profit it makes. I therefore suggest an amendment, which I hope the Senator will accept, and if he will I think there will be no objection to his amendment, using the usual words which are used when we desire to exempt a corporation or an individual who acts merely for charitable purposes. I propose to strike out, on line 5, after the word "income," the following words—

> "but nothing in the foregoing shall exempt shareholders individually in such corporation from taxation upon any dividend or distribution accruing to them from profits made by the corporation."

Then insert, after the word "purpose," on line 4, just above what I propose to have stricken out, these words—

> *"no part of the net earnings of which inures to the benefit of any private stockholder or individual."*

The amendment then would read:

> "That any incorporation chartered solely for burial purposes as a cemetery incorporation and not permitted by its charter to indulge in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private stockholder or individual, shall be exempt from taxation upon its income. Such incorporations shall be exempt from corporation tax upon their capitalization."

That would obviate the objection which is made upon this side of the Chamber, and I think would effectuate the very laudable purpose which the Senator from Tennessee has in view.

Mr. McKellar. *That would have the effect of exempting all that part of the profits which go to* the trust fund to *keep up the cemetery?*

Mr. McCumber. *Certainly, because that would not inure to the benefit of any stockholder or individual. It would simply inure to the benefit of the organization for the purposes set forth.*

Mr. McKellar. I understand the Senator's proposition, but I am afraid that the language he suggests would not effectuate it.

Mr. Williams. As far as I am concerned, I am willing to accept the modification suggested by the Senator. I want to go further, so as to make my purpose perfectly certain. I suggest that after the word "incorporation," in the first line, we insert the word "hitherto," so that it will read:

"That any corporation hitherto chartered."

I am so anxious, Mr. President, to avoid even any appearance of trying to make a profit out of the dead that I do not want any possibility of it.

Mr. McCumber. It would not be necessary to put in the word "hitherto," because if it applies to one corporation it ought to apply to another, and I can see no objection to it whatever if it is amended as I have suggested.

Mr. Williams. Very well. I have no objection to the modification suggested by the Senator from North Dakota.

Mr. McCumber. I hope the language I have suggested striking out will be left out.

Mr. McKellar. So far as I am able to do so, I am glad to accept the amendment suggested by the Senator from North Dakota.

Mr. King. In my own time, may I inquire of the Senator *whether the amendments offered* by the Senator from Tennessee and the Senator from Mississippi and the Senator from North Dakota *have for their object the exemption of the corporation itself from any corporate taxes?*

Mr. McCumber. *The object is to exempt them from any corporate taxes so long as they are exclusively engaged in the business referred to, and so long as all of their income is used to beautify the cemetery, and to be expended upon the cemetery,* and no part of its profits are to inure to the benefit of any stockholder or individual.

Mr. King. But suppose some of its profits are distributed in the form of dividends; while it is true that the distributees would pay their normal taxes or their surtaxes according to the extent of their incomes, I see no reason why the corporation itself in a case of that kind should not pay its corporate tax.

Mr. McCumber. It would.

Mr. McKellar. It would, except under the terms of the amendment suggested by the Senator from North Dakota.

Mr. McCumber. *If the profits are distributed, it comes without the provision of this amendment.*

Mr. King. If that is the case, I have no objection.

Mr. McCumber. *It permits the profit to be used for* public purposes and for the most worthy purposes for which it could be used, *the keeping up of the cemetery.*

Mr. King. I had in mind the statement of my colleague, and I can corroborate his remark. *I know that many of the corporations have charged extravagant prices for the lots which they have sold, and have made very large profits. Corporations of that character ought to pay the same as other corporations organized for the purpose of making profits, whether in trade, or commerce, or anything else.*

Mr. McCumber. *If all profits are utilized for beautifying the cemetery and keeping it up, they ought not to have to pay.*

Mr. King. *That is a different thing.*

Mr. McCumber. *That is all there is now to the amendment.* The Senator from Tennessee accepts the amendment to the amendment?

Mr. Williams. I accept it.

Mr. McKellar. I am willing to accept it.

Mr. McCumber. Now, I ask the Senator to agree to strike out the word "incorporation" wherever it occurs, and to insert in lieu thereof the word "corporation," so that it will conform to the language generally used throughout the bill.

Mr. McKellar. I accept that.

Mr. Williams. I agree to that.

Mr. Pomerene. I ask the chairman of the committee to accept a further amendment. If it does not meet with his approval, it can be taken care of in conference. On line 4, *insert the words "cemetery companies owned or operated exclusively for the benefit of their members, or which are not operated for profit."*

Mr. McCumber. *That, I think, is merely repeating what is in the amendment already.*

Mr. Pomerene. *I would say so,* except for the peculiar language in lines 4 and 5.

Mr. McCumber. I have no objection.

Mr. Pomerene. It can be stricken out in conference, if the Senator is of opinion that it is not necessary.

The Vice President. The question is on agreeing to the amendment as amended.

The amendment as amended was agreed to.

* * * * * * * * *

CONCLUSION

The legislative activity set forth above leaves no room for real doubt that if the language of section 501(c)(13) is given the meaning that its originators expressly and uniformly intended, plaintiff is entitled to tax exemption as a "corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to

engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

The December 1, 1952 agreement by which plaintiff acquired its cemetery property did not constitute the former Bartolo shareholders recipients of any inurement proscribed by the statute because under that agreement they received, at most, no more than the current fair market value of the property that they surrendered plus an allowance for reasonable compensation in the future for the credit that they extended plaintiff in respect to that property. (Findings 79-81, *infra.*)

The mortuary that plaintiff operates on its cemetery property bears a direct functional relationship to attainment of plaintiff's predominant purpose of furnishing burial facilities to the public. Accordingly, the mortuary operation is in point of fact not an activity that is "not necessarily incident to" plaintiff's "burial purposes" within the meaning of those terms as found in the exemption statute. (Finding 84, *infra*). To the extent that Revenue Ruling 64-109, n. 4, *supra*, purports to hold otherwise in the factual context present here, it stretches the meaning of the statute beyond what Congress intended and is therefore not binding in this case, *Abbott, Proctor & Paine* v. *United States*, 170 Ct. Cl. 408, 431, 344 F.2d 333, 346 (1965).

Finally, although all of plaintiff's operations, including its mortuary, are conducted on a commercially competitive basis that result in the realization of profits, there has been no inurement of its net earnings, within the contemplation of the exemption statute, inasmuch as all of plaintiff's profits have been applied to the development and betterment of its cemetery property. (Findings 82 and 83, *infra.*)

Accordingly, plaintiff is entitled to recover.

Findings of Fact

1. Plaintiff was incorporated on October 25, 1950, under Part 1, Division 2, Title 1, Section 9200 *et seq.* of the California Corporation Code. The parties have stipulated for purposes of this proceeding (1) that as such an entity, plaintiff was prohibited by California law from issuing stock and (2) that in fact it issued none.

2. On November 1, 1950, plaintiff took over the operation of what has since become, by virtue of subsequent real estate acquisition, the nation's largest single-tract memorial park. Utilizing the accrual method of accounting and operating on a September 30 fiscal-year basis, plaintiff operates a mortuary and engages in various other activities incidental and subordinate to that of selling interment rights for the burial of human remains. Now comprising more than 2,200 acres, plaintiff's cemetery property is located just northwest of the city of Whittier, California, about 12 miles east of the downtown center of Los Angeles. The property has sufficient capacity to accommodate almost 2,500,000 gravesites.

History and Development of Plaintiff's Cemetery Property

3. The real properties to which plaintiff succeeded in ownership following its formation had been accumulated over a period of years by a series of for-profit corporations dating back to 1914 when Cemeteries Improvement Corporation (Cemeteries) was formed for the purpose of establishing a cemetery near Whittier on 18½ acres of land that it acquired from A. H. Gregg. The cemetery's first interment occurred in 1915 and a mausoleum was built on the property in 1916. Its operations continued and expanded thereafter.

4. At a Cemeteries directors' meeting on August 13, 1928, J. L. Seppi, A. H. Gregg, and his son, John D. Gregg, re-

solved to take the preliminary steps necessary to the formation of a new corporation to acquire Cemeteries' assets, assume its liabilities, and to acquire certain other properties needed to secure financing for a new mausoleum.

5. In 1929, Cemeteries effected a reorganization. Whittier Heights Memorial Park (Whittier) acquired the net assets of Cemeteries, which by that time had increased to include approximately 31½ acres of land, in exchange for 704 shares of stock in Whittier. A. H. Gregg received approximately 54 percent of Whittier's stock, the same percentage of ownership that he held in Cemeteries. Pursuant to the plan of reorganization, A. H. Gregg then sold four-fifths of his stockholdings in the two companies in equal share to John Gregg, W. A. Johnson, J.L. Seppi, and A. Wardman for a total of $100,006.50.

In addition to the actions described above, at a directors' meeting on August 29, 1929, Whittier authorized the purchase of approximately 80 acres of land owned by A. H. Gregg. Based upon appraisals that included an estimate of the rapidly rising land costs, the directors authorized the issuance of 3,447 shares of treasury stock with a stated value of $115.50 per share to A. H. Gregg, equivalent in face value to a price of $5,000 per acre.

6. Following the reorganization detailed above, Cemeteries continued to exist as a holding company, its only asset being the 704 shares of Whittier stock. In 1930, A. H. Gregg resigned as president and director, A. Wardman was elected president, and W. A. Johnson was appointed as a director to succeed H. Sewell.

7. The Whittier corporation, under various names, operated the cemetery from 1929 until 1950. By 1930, the second mausoleum had been built. On August 12, 1930, the name of the company was changed to Rose Hills Memorial Park (Rose Hills), and on November 26, 1950, it was further changed to Bartolo Company.

8. From 1930-1937, J. D. Gregg, A. Wardman, W. A. Johnson, and J. L. Seppi were the controlling shareholders of Rose Hills. From 1937-1950, L. E. Bancroft and G. Sloan, in addition to the aforementioned individuals, were the controlling shareholders of Rose Hills and Bartolo.

9. From 1930 through 1950, Rose Hills, under the general management of John D. Gregg, engaged in the sale of grave spaces, made interments, sold all incidental facilities that were available and incident to business at that location. During this period, Rose Hills and Bartolo acquired an additional 74 acres of land and its stockholders controlled an additional 1,800 acres that could be used for cemetery purposes.

10. On December 16, 1942, A. Wardman, J. L. Seppi, John D. Gregg, and W. A. Johnson, the directors of Cemeteries, resolved to sell Cemeteries' 704 shares in the corporation then known as Rose Hills (originally Whittier) for $50 a share. On December 22, 1942, the directors formally resolved to wind up and dissolve. Cemeteries was thereupon dissolved.

11. On September 1, 1943, the following individuals agreed to form a limited partnership, to be called the Banslope Company, with percentage interests as hereafter indicated: W. A. Johnson (trustee), 46 percent; M. Corkett (trustee), 12 percent; F. Fuller (trustee), 12 percent; L. Bancroft, 11 percent; and G. Orton, J. Seppi, A. Wardman, G. Sloan, the balance. Banslope was formed for the stated purpose of manufacture, installation, purchase and sale of merchandise, including cemetery accessories, and, although it had other investments, its active business involved selling memorial tablets and markers.

On May 13, 1946, Banslope Company was incorporated and succeeded to the assets, subject to the liabilities, of the limited partnership. In exchange for their respective partnership interests, the partners received proportionately

equivalent value in the form of Banslope Company stock;[1] the total fair value of the partnership having been determined at not less than $110,000.

The officers of Banslope, who were also the directors, were as follows: W. A. Johnson, president; R. L. McNitt, Jr.,[2] vice president; and W. R. Fuller, treasurer.

12. It was Gregg's objective to have Banslope acquire land owned by Central Oil Company, consisting primarily of 1,750 acres of hill land in Whittier, California, so that the cemetery could later obtain that land for its ultimate expansion and development. Gregg constantly participated in discussions with the directors and managers of Banslope that resulted in Banslope's decision to acquire a controlling interest in Central. By January 13, 1947, Banslope owned such an interest in Central.

13. On January 13, 1947, at a directors' meeting of Central Oil, four of the former directors resigned and John D. Gregg, R. L. McNitt, W. A. Johnson, and L. E. Bancroft became the new directors.

On or about April 2, 1947, the name of Central Oil was changed to Central Land and Grazing Company (Central). The capital structure was revised to provide a stated capital of $240,000 and a $40,000 loan to Banslope was approved.

14. For each of the fiscal years ended September 30, 1947 through September 30, 1950, Rose Hills' after tax profits were $88,595; $143,252; $178,034; and $180,869, respectively. Rose Hills was able to obtain loans from two banks,

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[1] Although John D. Gregg was not directly a Banslope stockholder, his children owned about 50 percent of the stock which was held in trust. John D. Gregg, however, was not a trustee of these trusts.

[2] On December 18, 1946, G. Orton transferred his 550 shares to R. L. McNitt, Jr.

Security First National Bank of Los Angeles (Security) and Citizens National Trust & Savings Bank of Riverside (Citizens) as well as from other sources, principally Rose Hills' affiliates. During 1946 and 1947, Citizens made short-term unsecured loans totaling $200,000, which Rose Hills repaid by 1948. As of September 30, 1950, Rose Hills had secured and unsecured notes payable in excess of $300,000.

THE PERIOD OCTOBER 25, 1950—NOVEMBER 30, 1952

15. On October 25, 1950, Rose Hills Memorial Park Association, plaintiff, was incorporated under California law as a non-profit cemetery corporation.[3] Pursuant to the bylaws, the exercise of all corporate powers, which included the right to select and remove all officers, agents and em-

[3] Plaintiff's Articles of Incorporation recite that the specific and primary purpose for which the corporation is formed is to engage solely in the business of a non-profit cemetery corporation for burial purposes and that the corporation shall have no right to engage in any business not necessarily incident to that purpose, with the stated proviso that "the following powers and purposes shall be deemed necessarily incident thereto: 1. to own, operate, manage and control cemeteries, cemetery properties, mausoleums, crematories, and mortuaries, together with all appurtenances and equipment thereof, and to enter into contracts and other obligations necessarily incident to the carrying on of such functions." The articles also provide that no part of the net earnings of the corporation shall inure to the benefit of any member or private individual and that no part of the corporation's assets or properties upon dissolution shall be distributed to or belong to or be available to any of the members or any private individuals but shall be distributed to the persons, corporation or other organizations who are then operating or maintaining the perpetual care of the cemetery properties then owned by the corporation.

The trustees of plaintiff were designated as *the* members of plaintiff. There was no requirement that any member own a grave site or other cemetery property, and ownership of a grave site would not give membership to the owner. The trustees were to be elected annually by the members and vacancies were to be filled by plaintiff's remaining trustees.

ployees was vested in a board of trustees. At date of incorporation all members of the board of trustees were associated with the Los Angeles law firm of Latham & Watkins. The California Corporation Code requires that nonprofit, non-stock cemetery corporations have members as well as trustees or directors. At all times, the same individuals have been plaintiff's members and its trustees. No separate membership register was required by State law and none was kept. The names of the members were always readily ascertainable, however, by reference to plaintiff's books and records.

16. By a letter agreement of November 1, 1950, between plaintiff and Bartolo, plaintiff agreed to take over operation of the cemetery and conduct that business in a manner similar to that which Bartolo had employed. In addition, plaintiff agreed to purchase land needed for cemetery purposes from Bartolo and to pay for it at the rate of 50 percent of the proceeds from the sale of lots, plots, and graves, and 60 percent of the gross proceeds from the sale of niches, crypts, vaults, family sections, and other mausoleum columbarium property, based upon schedules of reasonable minimum prices to be agreed upon in advance and exclusive of amount collected for endowment or special care.

17. On February 9, 1951, the directors of Banslope approved the proposed merger of Banslope with Bartolo. On February 19, 1951, the shareholders of Banslope who had held its 11,000 outstanding shares of stock since December 18, 1946, approved the merger. On the same day, the Bartolo shareholders, namely, John D. Gregg, L. E. Bancroft, J. L. Seppi, G. W. Sloan, A. Wardman, and W. A. Johnson and his daughters, Mrs. F. Fuller and Mrs. M. Corkett, approved the merger.

On February 19, 1951, Banslope was merged into Bartolo, which was the surviving corporation. Bartolo had previously effected a 35 for 1 stock split, increasing its outstanding shares from 3,452 to 120,820. Banslope share-

holders received in cancellation of their shares approximately 2.7459 shares of Bartolo for each Banslope share. The stock split and subsequent merger caused Bartolo to have outstanding 151,025 shares of its stock.

18. On April 9, 1951, Bartolo purchased Central's assets (other than mineral rights) subject to its liabilities. Central's assets included 1,750 acres of hill land in Turnbull Canyon which were purchased for approximately $163,200 and 53.75 acres of pasture land on Workman Mill Road, purchased for approximately $118,270.

Central conveyed the mineral rights to the hill lands to Puente Farms Company (Puente) (incorporated on March 8, 1951), in exchange for 24,000 shares of Puente stock. With the exception of J. Seppi, the same persons who were both trustees of plaintiff and directors of Bartolo were directors of Puente. After the sale of assets to Bartolo, mentioned above, Central distributed all of its remaining assets, *i.e.*, cash and Puente stock, to its shareholders.

Several oil wells have been drilled on the hill lands but none have produced any oil. The last drilling lease was quitclaimed by the lessee in 1958.

19. On May 14, 1951, Bartolo entered into loan agreements with Citizens and Security Banks whereby these banks were committed to lend until September 1, 1952, up to $700,000 at 4 percent per annum, payable monthly.[4] In addition to stated requirements as to Bartolo's net worth and current ratio, the banks acknowledged that the loans were based upon Bartolo's present executive management and no changes could be made without their consent.

20. On July 1, 1951, plaintiff and Bartolo entered into an agreement effective November 1, 1950, to spell out in fur-

[4] This agreement was amended on January 1, 1952, at which time the initial borrowing had been curtailed to $400,000. By the amendment the banks were committed to lend an additional $250,000, with interest at 4¼ percent.

ther detail their letter agreement of that earlier date. Article 3, Section D of the agreement provided for the purchase by plaintiff of approximately 61 acres of land for $2,055,306 payable in 10 or less annual installments, without specified minimum or maximum amounts and without interest on the unpaid balance, the first installment payable September 30, 1951. The purchase price for the 61 acres, which had been fully developed for cemetery use and was in condition to receive interments, was determined by taking 50 percent of the estimated aggregate sales price of the individual grave sites when finished. Bartolo's basis for the 61 acres was $223,542. Plaintiff also acquired the option to purchase the bulk of the additional land owned by Bartolo which was dedicated and/or for which a permit had been issued for cemetery purposes as of November 1, 1950. Bartolo was obligated to develop such additional land designated for purchase by plaintiff and would receive 50 percent of plaintiff's then estimated average selling price of all grave spaces on the land so purchased, also payable in 10 or less annual installments without interest, from and after delivery of the deed by Bartolo.

Part IV of the agreement covered the purchase of the two mausoleums for $603,480 payable in 10 or less annual installments without interest.[5] The purchase price for the mausoleums was determined by taking 60 percent of the total estimated gross proceeds from this property. Bartolo's basis for the mausoleums was $256,652.

21. On September 28, 1951, plaintiff entered into loan agreements with the same two banks of the May 14, 1951 agreement. Under the agreements, generally embodying

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[5] The remaining articles provided for plaintiff's leasing Bartolo's buildings, tools and equipment, water system, an option by Bartolo to construct additional buildings, mausoleums or make other improvements upon the cemetery which were desired by the plaintiff. Finally, it appointed plaintiff to collect Bartolo's accounts receivable due as of October 31, 1950 on sales prior to that date.

the same conditions as the earlier ones, the banks were committed to lend until September 1, 1952, up to $300,000 with interest at 4 percent per annum payable monthly. Covenants were made as to continuation of plaintiff's management. Bartolo executed a subordination agreement, whereby it agreed that the $2,250,000 debt due it from plaintiff would be subordinated to the debts to the banks.

22. On September 28, 1952, Bartolo sold to plaintiff an additional 9.6 acres of cemetery land at a price of $563,740, payable in 10 or less annual installments without interest.[6] The land was either fully developed or to be fully developed at the seller's expense. The purchase price was computed by using the 50 percent and 60 percent figures agreed upon in the letter agreement of November 1, 1950. At the time of sale Bartolo's basis for the 9.6 acres was $50,408.

23. In addition to the 1,803.75 acres Bartolo acquired from Central in April 1951, it purchased an additional total of 257.50 acres of vacant land from unrelated third persons in 1951 and 1952 for which it paid $390,000.

24. On December 1, 1952, John D. Gregg, plaintiff's president, informed the Board of Trustees that negotiations had been proceeding for the purchase of Bartolo's outstanding stock. He told them that a fixed price would not be set, but that the price, payable in percentages of gross sales, would be geared to the proceeds of the sales recovered by plaintiff from the Bartolo property. A draft of the agreement of sale was unanimously approved and Gregg and Sloan were authorized to execute the contract for the purchase of Bartolo's stock.

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[6] Pursuant to a contract entered into on February 27, 1953, but effective September 1951, plaintiff purchased an additional 8.1 acres from Bartolo of which 1.5 acres had been transferred prior to December 1, 1952. As to terms of payment the contract was similar to those of the September 28, 1952 and July 1, 1951 agreements—the payment was due 10 years after date of deed or on February 26, 1963.

THE DECEMBER 1, 1952 AGREEMENT BETWEEN PLAINTIFF AND BARTOLO'S SHAREHOLDERS

25. On December 26, 1952, plaintiff entered into an agreement (effective 12/1/52) with the Bartolo shareholders to obtain their entire stockholdings in that company. As of December 1, 1952, the following were both the directors of Bartolo and the sole trustees of plaintiff: A. Wardman, John D. Gregg, W. A. Johnson, J. L. Seppi, G. W. Sloan, L. E. Bancroft, and R. L. McNitt, Jr. The Bartolo stockholders and their holdings as of December 1, 1952 were as follows:

		Shares	*Percent*
A. Wardman		3,806½	2.52
J. D. Gregg		59,500	39.40
William A. Johnson, individual	25,950		
William A. Johnson, trustee	15,294		
Six Johnson Trusts	2,400		
Margaret J. Corkett, Johnson daughter	700		
Margaret J. Corkett, trustee	3,625		
Frances J. Fuller, Johnson daughter	700		
Frances J. Fuller, trustee	3,625		
	52,294		34.93
J. L. Seppi		12,286	8.13
G. W. Sloan		4,690½	3.10
L. E. Bancroft		16,938	11.22
R. L. McNitt		1,510	1.00
Total		151,025	100

The only two individual shareholders in Bartolo who did not become trustees of the plaintiff were F. Fuller and M. Corkett, the daughters of W. A. Johnson.

26. The agreement referred to in finding 25, above, contained the following provisions, set forth under the captions indicated below:

RECITALS

(1) Bartolo Company (hereinafter called "Bartolo") is a California corporation. It owns buildings, improvements, and land comprising and adjacent to the cemetery operated by the Association.

(2) The Association is a non-profit California cemetery corporation which has operated a cemetery known as Rose Hills Memorial Park since November 1, 1950. The Association has been classified as an exempt corporation under Section 101(5) of the Internal Revenue Code.

(3) Effective as of November 1, 1950, Bartolo assigned to the Association all of its right, title, and interest in and to that certain agreement dated May 19, 1944 between Bartolo and Rose Hills, Inc., a non-profit California corporation, custodian of the Endowment Care Fund for Rose Hills Memorial Park, and the Association assumed all obligations of Bartolo under said agreement.

(4) On July 1, 1951, but effective as of November 1, 1950, Bartolo and the Association executed an agreement relating to the purchase, leasing, and use of certain portions of the land, buildings, improvements, and equipment owned by Bartolo but required by the Association in the operation of a general cemetery business.

(5) Bartolo has 151,025 shares of common stock, all of one class, outstanding. Sellers are the owners of all of said outstanding stock of Bartolo.

(6) Sellers desire to sell to the Association, and the Association desires to buy from Sellers all of said outstanding shares of common stock of Bartolo owned by Sellers. Association believes that the immediate acquisition of said shares of stock will enable the Association to meet and dispose of the three following major problems with which it is confronted, to wit:

(a) insure that its substantially increased needs for land for cemetery purposes will be taken care of for the future;

(b) give the Association protection in the acquisition of buildings and equipment needed in the conduct of the cemetery business, which equipment the Association does not now have; and

(c) make available to the Association indirectly additional capital to enable it to operate, develop, and grow in accordance with presently indicated trends.

SECTION I. DEFINITIONS

For all purposes of this Agreement, unless the context otherwise requires:

A. "Endowment Care Deposits" shall mean those payments set aside with the Custodian of the Endowment Care Fund, except that for the purposes of this Agreement, said deposits shall not exceed 15% of the aggregate annual gross selling price of grave spaces, crypts, underground crypts, and niches, provided that in no event shall said deposits be less than the minimum prescribed by law.

B. "Custodian" shall mean Rose Hills, Inc., a nonprofit California corporation, its successors and assigns, the custodian of the Endowment Care Fund.

C. "Endowment Care Fund" shall mean the aggregate of the funds held by the Custodian, the use of

which is governed by the California Health and Safety Code and which was formerly known as "perpetual care."

D. "Mausoleums" shall mean the mausoleums designated as Mausoleum No. 1 and Mausoleum "El Portal de la Paz" (sometimes referred to as Mausoleum No. 2), respectively, now located at the cemetery, as well as any additions to said mausoleums, or either of them, and any other mausoleums, buildings, structures or crypts placed upon such land, which may hereafter be constructed at the cemetery upon land now owned by Bartolo, used, or intended to be used, for the interment of human remains.

E. "Columbariums" shall mean the columbariums now located at the cemetery, as well as any additions to said columbariums, or any of them, and any other columbariums, buildings or structures which may hereafter be constructed at the cemetery on land now owned by Bartolo, used, or intended to be used, for the interment of cremated human remains.

F. "Underground Crypts" shall mean adjoining crypts below the surface of the ground, not enclosed in a building, and used, or intended to be used, for the entombment of uncremated human remains.

G. "The Cemetery" shall mean the properties now or heretofore owned by Bartolo which have been dedicated for cemetery purposes and/or as to which cemetery permits have been issued, or which may hereafter be so dedicated or permitted, and the buildings and improvements thereon used in, or in conjunction with, the cemetery business being carried on by the Association.

H. "Gross selling price" shall mean:

(1) In the case of grave space, gross billings for sales thereof, excluding therefrom only Endowment Care Deposits and any amount credited to the gross

billing on account of grave spaces, niches, crypts, or underground crypts exchanged in connection with such sales;

(2) In the case of niches and/or crypts, gross billings for sales thereof, excluding therefrom only Endowment Care Deposits and any amount credited to the gross billing on account of grave spaces, niches, crypts, or underground crypts exchanged in connection with such sales;

(3) In the case of underground crypts, gross billings for sales thereof, excluding therefrom only Endowment Care Deposits and any amount credited to the gross billing on account of grave spaces, niches, crypts, or underground crypts exchanged in connection with such sales;

(4) In the case of real property, or any interest or estate therein (except as described in subparagraphs (1), (2), and (3) of this paragraph H), gross billings for sales thereof, or gross rentals, royalties, or other amounts received and attributable thereto, whether received in cash or in kind.

I. "Purchase Price" shall mean the aggregate amounts to be paid to Sellers by the Association under the terms hereof.

SECTION II. REPRESENTATIONS, WARRANTIES, AND COVENANTS

* * * * * * * * *

B. Affirmative covenants of the Association:

(1) The Association represents, warrants, and covenants that at the date hereof, and so long as any amount is payable to or may become payable to Sellers:

(a) It is a non-profit cemetery corporation, duly organized and existing under the laws of the State

of California, and that under date of August 27, 1952, the Commissioner of Internal Revenue of the United States ruled that it is an exempt corporation under the provisions of Section 101(5) of the United States Internal Revenue Code.

(b) It is conducting, operating, and maintaining, and will continue to conduct, operate, and maintain a cemetery business at and from the cemetery only, including the selling of grave spaces, crypts, underground crypts, niches, concrete boxes, burial vaults, memorials, flowers, entombments, niche inurnments, cremations, cremation containers, and the charging of fees for all services incidental to the disposition of dead human remains.

(c) It will continue to operate as a non-profit cemetery corporation; will not amend its charter, or cause or permit its charter to be amended, in any manner that would cause or permit it to lose its status as a non-profit cemetery corporation under the laws of California; will amend, or cause to be amended, its charter to the extent, if any, hereafter necessary in order to preserve its status as a non-profit cemetery corporation under the laws of California, and will operate in such manner as to assure, to the extent that the same is within the control of the Association, that it will continue to qualify as an exempt corporation under the provisions of the United States Internal Revenue Code.

(d) It is making and will continue to make charges in connection with the establishment, maintaining, operating, improving, and conducting its cemetery business, interring human remains, and the care, preservation, and embellishment of cemetery property.

(e) It will, to the fullest extent economically feasible and practical for its operation, use all land, buildings, or other properties which it has acquired or may hereafter acquire from Bartolo for cemetery purposes.

(f) On all sales of grave space, crypts, underground crypts, and niches, it will collect from the purchasers thereof Endowment Care Deposits and will pay said deposits to the Custodian, as provided and required by the California Health and Safety Code.

(g) It will expend for the purpose of preserving and maintaining the cemetery, when and as necessary, all income from the Endowment Care Fund received from the Custodian, and may expend such other amounts received from other sources as may be necessary for the purpose of such preservation and maintenance; provided, however, that the Association shall be the sole judge in determining what is desirable or necessary for such preservation and maintenance, and its decision in that regard shall be final.

(h) It will maintain and preserve its corporate existence and all rights, franchises, and other authority adequate for the conduct of its business; maintain its properties, equipment, and facilities in good order and repair; and conduct its cemetery business in an orderly manner without voluntary interruption (excluding labor disputes), and, except as elsewhere herein permitted, not change the type or character of its business.

(i) It will maintain on all of its real and personal property adequate insurance in good and responsible insurance companies against fire and other risks to the extent reasonable and prudent

in the conduct of its business; and fully insure in responsible insurance companies against liability arising out of or in connection with the conduct of its business.

(j) It will duly and punctually pay and discharge, before the same become delinquent and before penalties accrue thereon, all taxes, assessments, and governmental charges upon or against it or any of its properties, and all its other liabilities at any time existing, except to the extent that, and so long as (i) the same are being contested in good faith and by appropriate proceedings in such manner as not to cause any materially adverse effect upon its financial condition or the loss of any right of redemption from any sale thereunder, and (ii) it shall have set aside on its books reserves (segregated to the extent required by sound accounting practice) deemed by it adequate with respect thereto.

(k) It will maintain a standard and modern system of accounting in accordance with generally accepted accounting practice; cause Bartolo to do the same; and will maintain for inspection by Sellers at its offices:

(i) As soon as available, and in any event within 120 days after the end of each fiscal year of the Association, a balance sheet of the Association and of Bartolo as of the end of such fiscal year and statements of income and surplus of the Association and of Bartolo for such fiscal year, all in reasonable detail and certified by independent public accountants of recognized standing secured by the Association.

(ii) Within 120 days after the end of each fiscal year of the Association, a certificate of

the President or Treasurer of the Association, stating that to the best of his knowledge and belief the Association has performed and observed each and every covenant contained in this Agreement on the part of the Association to be performed, and that no event then exists which constitutes an event of default thereunder or would constitute such event of default upon the lapse of time or upon the giving of notice and the lapse of time, specified therein; or if any such default or event exists, specifying the nature thereof, of which the signer of such certificate may have knowledge.

(l) It will promptly advise Sellers in writing of the existence of any event of default or of any event which would become an event of default upon the lapse of time or upon the notice and lapse of time specified in this Agreement.

(m) It will cause Bartolo to observe, on its own behalf, the representations, covenants, and warranties set forth in subsections (i) and (j) of this subparagraph (1) of paragraph B.

C. Negative covenants of the Association:

(1) The Association represents, warrants, and covenants that so long as any amount is payable hereunder or may become payable hereunder, it will not do any of the following:

(a) Make any material change in the type or character of its business as the same presently is being conducted, except such changes as may be made in order that the type or character of its business will conform with that which is being conducted by other comparable organizations in Southern California.

(b) Sell, lease, or otherwise dispose of, or cause, suffer, or permit Bartolo to sell, lease, or otherwise dispose of land, improvements, buildings, machinery, equipment, choses in action, water rights, mineral rights, or other property except in the ordinary course of the Association's business of operating the cemetery or Bartolo's business incidental thereto, unless the Association shall in good faith determine that as to any transaction it would be impractical, economically not feasible, and detrimental to the best interests of the Association and Sellers to observe this covenant; provided that such determination as to any transaction shall not constitute a determination as to any other transaction.

(c) Create, assume, or suffer to exist any mortgage, pledge, encumbrance or lien or charge of any kind upon any property or other assets now owned or hereafter acquired by it; provided, however, that this restriction shall not be applicable to nor prevent:

(i) Liens for taxes or assessments or for mechanics' or materialmen's claims; or liens or deposits in connection with workmen's compensation insurance, social security obligations, or other similar charges, all arising in the ordinary and normal operation of its cemetery business if the same are not overdue or, if overdue, are being contested in good faith and by appropriate proceedings in such manner as not to affect adversely its financial condition;

(ii) Liens or deposits in connection with surety, stay, or appeal bonds, or deposits required by law or governmental regulation or by any court order, decree, or judgment as a condition to the transaction of business or the exercise

of any right, privilege, or license reasonably necessary in the transaction of its business;

(iii) Zoning restrictions, easements, licenses, restrictions on the use of real property or minor irregularities in title thereto, which do not materially impair the use of such property in the operation of its business or the value of such property for the purpose of such business;

(iv) Liens or encumbrances on property now owned by the Association or hereafter acquired by it if the Association shall in good faith, and prior to the creation thereof, determine that neither the creation thereof, the acquisition and use of funds thereby, nor the repayment thereof, would be detrimental to the best interests of Sellers hereunder; provided, that any such determination by the Association shall be formally expressed in the minutes of the trustees of the Association; and provided further that if (aa) the Association shall at any time hereafter desire to incur indebtedness and shall be required as a condition thereof to obtain a subordination of its obligations to Sellers hereunder to said proposed indebtedness, Sellers agree that such indebtedness may be incurred and such subordination may be effected and shall be binding upon all of them if 51 per cent in interest of Sellers consent in writing thereto; and (bb) the Association shall at any time hereafter desire to defer, in whole or in part, payment of amounts due on its obligations to Sellers hereunder, Sellers agree that such postponement may be effected and shall be binding upon all of the Sellers if 51 per cent in interest of Sellers consent in writing thereto.

(d) Purchase any securities, other than those covered by this Agreement nor make any investment in the securities or business of, or loans or advances to, any person or other entity, except in the ordinary and normal operation of its business; or guarantee or otherwise become liable upon the obligation of any person or other entity except by endorsement of negotiable instruments for deposit or collection in the ordinary and normal course of its business.

(e) Liquidate or dissolve, or commence any proceedings therefor.

(f) Cause, suffer, or permit Bartolo to do, permit to be done, or authorize any of the things enumerated in the foregoing subsections (a) through (d) of this subparagraph (1) of paragraph C, except to the extent that the Association is permitted to do them.

D. The affirmative and negative covenants set forth in this Section II are for the benefit of Sellers and the Association, and are not for the benefit of any third party.

* * * * * * * * *

SECTION IV. Payment of Purchase Price

A. The Association will pay to the Sellers for the shares of common stock, the purchase and sale of which is provided for by this Agreement, a purchase price determined as follows:

(1) Thirty per cent (30%) of the gross selling price of grave spaces hereafter sold by the Association in or upon real property now or heretofore owned by Bartolo.

(2) Ten per cent (10%) of the gross selling price of niches and/or crypts, hereafter sold by the Association in any mausoleums and/or columbariums.

(3) Twenty-five per cent (25%) of the gross selling price of underground crypts designed for one entombment; and twenty per cent (20%) of the gross selling price of underground crypts designed for two or more entombments hereafter sold by the Association in or upon real property now or heretofore owned by Bartolo.

(4) On the sale, leasing, or other disposition of real property, or any estate or interest therein, whether made by the Association or Bartolo (other than as described in subparagraphs (1), (2), and (3) of this paragraph A, and other than sales, leases, or other dispositions by Bartolo to the Association):

(a) 50% of gross rentals, royalties, or other amounts received for the use of such real property, or estate or interest therein;

(b) Except as provided in subparagraph (c) hereof, on sales or exchanges of real property the following percentages of the gross selling price (which, in case of an exchange, shall mean the market value of the property acquired on the exchange):

(i) During the first five years after the date of this Agreement, 90%;

(ii) Commencing with the sixth year after the date of this Agreement and until the end of the fifteenth year, 80%;

(iii) Thereafter, 75%.

(c) In the case of exchanges for property similar or related in service or use, or potential service or use, to the property exchanged, and in the case of sales made within 90 days of the purchase by the Association, or Bartolo, of property similar or related in service or use, or potential service or use, to the property so sold, the acquired prop-

erty shall, for the purposes hereof, upon such acquisition become a part of the cemetery, shall thereafter be deemed to be "property now or heretofore owned" by Bartolo, and no payment shall be made to Sellers in connection with any such exchange or sale.

B. Payments to Sellers upon the purchase price, to the extent that the same is determined in the manner specified in subparagraphs (1), (2), and (3) of paragraph A of this Section IV, shall be made not less often than semi-annually from the amounts accrued on gross billings upon which final collection has been received; and to the extent that the same is determined in the manner specified in subparagraph (4) of paragraph A of this Section IV, not less often than semi-annually from each payment on account of gross billings therefor. Such payments need not, however, exhaust the amounts then accrued, but shall be made in amounts which will, as nearly as feasible, exhaust said accruals.

C. Payments on the purchase price shall be made by the Association at the times prescribed in the preceding paragraph B direct to Sellers. Unless the Association shall have received written notice of a change of address of a Seller such payments shall be mailed to the Seller's address as set forth in Section VII, paragraph B hereof. If any Seller shall have transferred, whether voluntarily or by operation of law, to another or other persons all or any portion of his interest hereunder, such payments shall be made by the Association as follows:

(1) If written notice of such transfer has not been received by the Association on or before fifteen days preceding the then current payment date, to the person or persons then appearing on the Association's records as the holder of the interest;

(2) If written notice of such transfer has been received by the Association on or before fifteen days preceding the then current payment date, to the person or persons designated in such written notice.

The Association shall be discharged from any further liability as to any such payment if the same is made as provided in this paragraph C. If in any case the Association is in doubt as to the person or persons entitled to receive any such payment it may refuse to make the same until such time as it has received written instructions, satisfactory to the Association in form and substance, as to the person or persons entitled to such payment, and the Association shall not be liable for interest, penalties, or surcharge of any kind for failure or refusal to make any payment prior to receipt of such satisfactory instructions.

Section V. General Provisions

A. This Agreement may be modified or amended by written consent of the Association and at least 51% in interest of Sellers. In determining said 51%, any interest of any of Sellers which shall have been acquired, directly or indirectly, by the Association or Bartolo, and which is then owned, directly or indirectly, by the Association or Bartolo, shall not be considered as a Seller's interest.

B. Waiver by Sellers, or any of them, of the breach of any of the terms or conditions hereof shall not be deemed to be a waiver of any subsequent breach of the same or any other term or condition. Any consent by the Sellers, or any of them, to any amendment or modification of this Agreement or any of the terms or provisions thereof shall not constitute a consent to any other or subsequent modification or amendment.

C. Time is of the essence hereof.

D. Provision is made herein for payment of the purchase price measured in part by the sale of grave spaces, niches, underground crypts, and crypts in land heretofore purchased by the Association from Bartolo, or in buildings or structures which may hereafter be erected by the Association at its own expense. Such provision, and the percentages utilized herein for determining the amount of the purchase price, have been determined in such a way as to measure a fair, just, and reasonable purchase price to be paid to Sellers for their stock in Bartolo, and in recognition of the value of the use which may be made by the Association of properties which it has heretofore acquired or may hereafter acquire from Bartolo.

Section VI. Default

A. This Agreement provides for the payment of the purchase price by the Association to the Sellers in an amount not presently determinable and over a period, the duration of which cannot presently be determined. It is recognized and agreed that it would be impracticable or extremely difficult to fix or determine the actual damage to the Sellers resulting from any material breach of this Agreement by the Association. The Association and the Sellers therefore agree that in the event of material breach by the Association of this Agreement, the Sellers, at their option and in addition to any other remedies that they may have for such breach, may after ten days' written notice of such breach, signed by not less than 51% in interest of Sellers, specifying the particulars thereof, and the failure by the Association to remedy said breach within said period, do, or cause the following to be done:

(1) Immediately demand and receive payment in full of any amounts due hereunder but not paid.

(2) If Bartolo shall at that time still be in existence, demand and receive from the Association the shares of stock of Bartolo the sale of which is herein provided for and the reconveyance and delivery of all real property theretofore acquired by the Association from Bartolo and not theretofore sold or contracted to be sold by the Association.

(3) If Bartolo shall not longer be in existence, demand and receive from the Association any and all properties theretofore acquired by the Association from Bartolo and not theretofore sold or contracted to be sold by the Association, together with any and all contracts, accounts receivable, notes receivable, or other choses in action then held by the Association but attributable to or derived from, directly or indirectly, properties theretofore acquired by the Association from Bartolo.

(4) Sellers shall be fully entitled to retain and keep, without any claim whatsoever thereagainst by the Association, all amounts of the purchase price theretofore paid by the Association.

B. A material breach of this Agreement by the Association shall be deemed to have occurred if:

(1) The Association shall default in payment of any installment of the purchase price, and such default shall not have been cured within the period of notice hereinabove provided; and/or

(2) There shall have occurred any breach by the Association of any of its warranties or representations, as set forth in Section II hereof.

27. A non-profit cemetery customarily commences operations without any substantial capital in the sense that it has no substantial funds of its own, and normally acquires its assets principally on credit. In California, non-profit ceme-

teries have over the years usually and customarily acquired their assets by paying a purchase price computed as a percentage (not over 50%) of gross sales of interment spaces made out of the acquired land. This has been customary because newly-formed non-profit associations find it difficult to borrow money from financial institutions because they have no credit background and because dedicated cemetery land is not regarded as desirable collateral by lending institutions. Such credit problems confront non-profit associations acquiring an operating cemetery as well as those acquiring undeveloped land.

28. There are presently about 25 mature non-profit cemeteries in California, most of which were established prior to 1913. None of the dozen or so largest cemeteries in the state are profit corporations. With one or two exceptions, all of the major California non-profit cemeteries got their start by acquiring either land or an existing cemetery on the basis of the percentage type of contract with no fixed limitation on the amount payable. This method of acquisition of cemeteries has had legal sanction in California for many years under the provisions of Civil Code sections which were modeled after New York law.

29. In view of the difficulties normally encountered by a non-profit cemetery association in obtaining from conventional lending sources the long-term credit needed to fund land acquisition, a purchase arrangement of the type utilized in this case is an appropriate financing device by which the association secures its land acquisition credit from the seller of the land, thereby avoiding the necessity of satisfying the requirements of a third-party lending institution. Since the seller of the land agrees to await payment until the cemetery has resold it as gravesites and received payment from individual customers, the total purchase price specified by such an agreement represents both the selling price of the land involved and the value of the association's interest-free use of the amount of that price from the date that possession and use of the land

are acquired until the future date, following resale and collection, on which the association is obliged to pay for it.

30. By virtue of their status as trustees, findings 15 and 25, *supra*, the former Bartolo shareholders who were the sellers under the December 1, 1952 agreement assumed and retained effective control over plaintiff's affairs. In the absence of such control over the debtor-purchaser, it is unlikely that under the economic circumstances present here any landowner would be willing to sell his property under such an agreement. In any event, the evidence shows that the former Bartolo shareholders exercised this control in a manner that did not go beyond those things reasonably necessary to safeguard their legitimate creditors' interest under the sales agreement. Consistent with this evident lack of overreaching, the trustees uniformly met their fiduciary obligations under California law and otherwise acted solely in deference to plaintiff's best interests.

31. Under all of the circumstances present in this case, including prevailing money rates, risk, collateral and considerations of control, it is concluded that a rate of 7 percent per annum is a reasonable rate of compensation for the credit extended plaintiff under the December 1, 1952 agreement.

32. Of the total acreage conveyed to plaintiff under the December 1952 agreement, only 192.61 acres were legally dedicated to cemetery use and were available for development and sale for that purpose. Because of its dedication, it is concluded that the fair market value of this acreage should be calculated in terms of its use for cemetery purposes.

33. As the cemetery property acquired by plaintiff had been theretofore operated, one gross acre yielded 1135 grave spaces and such spaces were sold at the rate of 12,500 per year. The evidence establishes a reasonable expectation that a net sales price of $160 would be realized by plaintiff for each grave space. In addition, the evidence

shows that plaintiff's annual dollar volume of sales of mausoleum crypts and niches would consistently approximate 7 percent of its dollar volume of grave space sales for the same year. Finally, the evidence shows that plaintiff would realize an additional net profit of not less than $125 from sales of markers, flowers, openings and closings, etc. from each interment on the property.

34. Employing the criteria stated in findings 31, 32 and 33, *supra*, the December 1, 1952 fair market value of the 192.61 acres referred to in finding 32, *supra*, was $9,787,078; that figure being the present value (using a 7 percent present worth factor) of the net receipts to be predictably realized by plaintiff from the 192.61 acres over a period of 17½ years.

35. The evidence further shows that on December 1, 1952 the 1,962 acres acquired by plaintiff and not dedicated to cemetery use had a cash value, principally for subdivision and light industrial purposes, on the then-current market of not less than $665,000.

36. Accordingly, on December 1, 1952 the land sold to plaintiff by the Bartolo shareholders by the agreement of that date, had a fair market value of not less than $10,452,000.

37. With each gross acre yielding 1135 grave spaces, plaintiff acquired a total of 2,499,000 salable gravesites under the December 1, 1952 agreement. As hereinafter explained, the evidence shows that in return for those potentially salable gravesites the former Bartolo shareholders received rights to future revenues that had a fair market value of $6,951,583 on the date of execution of the agreement. In conformity with the purport of the evidence, $6,464,973 of that total present value relates to future receipts from grave sales and the remainder, $486,610 (that figure being 7 percent of the total) is the fair market value of future receipts from plaintiff's sales of mausoleum crypts and niches.

38. As heretofore noted, finding 33, *supra*, the evidence reveals a stabilized sales price of $160 per grave and a sustained average rate of 12,500 grave sales per year plus mausoleum crypt and niche sales consistently approximating 7 percent of the dollar volume of annual grave sales. Under the purchase price percentage provisions of the December 1, 1952 agreement, as applied to the factual premises established by all of the evidence adduced in this case, the former Bartolo shareholders will collectively receive a total of $615,000 per year for the 200-year period required to fully liquidate the beginning inventory of 2,499,000 gravesites at a rate of 12,500 sales per year.

39. Discounting to present value the Bartolo shareholders' total receipts of $123,000,000 over a 200-year period by using the 7-percent per annum interest factor deemed a reasonable and proper credit increment on the facts of this case, finding 31, *supra*, the fair market value, at December 1, 1952, of the sellers' right to future receipts under the agreement of that date with plaintiff was $8,785,705.

40. Because plaintiff customarily sold grave spaces, crypts and niches under a so-called pre-need sales promotion plan that allowed the buyer installment payment privileges and because the December 1, 1952 agreement permitted plaintiff to defer payments thereunder until it received full payment from its customers, the fair market value of the sellers' rights to future receipts under the agreement with plaintiff must be reduced by $1,834,122, in order to reflect, using a 7-percent discount rate, the initial 5-year lag between plaintiff's sales and its payments in respect thereto as required by the agreement.

OPERATIONS FROM DECEMBER 1, 1952 TO 1961

41. After plaintiff acquired Bartolo's stock in 1952, it proceeded as fast as John Gregg could make the development plans go. In 1952, the trustees envisaged expenditure of millions of dollars on development projects. The planned

development began in 1954 and expenditures totaling about seven and three-quarter million dollars were made for the following through 1966:

Construction and improvement of administrative and mortuary buildings and sites (1954-1963)	$2,637,000
Development of hill land (1956-1965)	4,186,000
Construction of hillside chapel (1954-1958)	401,000
Construction of memorial chapel (1962-1966)	445,000
Total	7,669,000

42. On December 1, 1954, plaintiff and Bartolo entered into a credit agreement with Security and Citizens Banks. The May 14, 1951 loan agreement as amended January 10, 1952, was cancelled. The two notes of Jaunary 10, 1952 having a total outstanding balance of over $450,000 were amended pursuant to the terms of the present agreement.

Security committed itself to lend up to one million dollars and Citizens up to $500,000, at 4 percent interest until January 1, 1956 to either plaintiff or Bartolo.[7] Bartolo and plaintiff guaranteed payment of all notes of the other company and they executed a joint instrument to that effect.

The borrowers further agreed to subordinate plaintiff's obligation under the 1952 agreement to the prior payment of the notes and prior discharge of all liabilities and obligations of plaintiff under the above-mentioned guarantee agreement.

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[7] On May 26, 1956, Bartolo, plaintiff, Security and Citizens Banks amended the credit agreement of December 1, 1954. Security committed itself to loan an additional $1,400,000 and Citizens an additional $100,000 up to May 1, 1958. The conditions for such commitments were similar to those contained in the December 1, 1954 agreement.

Further, the borrowers agreed to perform the 1952 agreement without any change in the terms or provisions thereof. If payments under this agreement exceeded $120,000 for any fiscal year, the two corporations agreed to promptly make a payment on their respective notes in an amount equal to such excess.

The borrowers also promised not to engage in any business other than the cemetery operation, nor make any material change in the executive management. Restrictions were also placed upon obtaining financing from other sources and on paying dividends.

43. On December 1, 1954, plaintiff, the former Bartolo shareholders (transferors) and the two banks entered into a subordination and deferral of payment agreement, pursuant to such covenants under the December 1, 1952 agreement (finding 26, *supra*). The transferors' claims were subordinated to the banks' preferential indebtedness to the extent of $2,500,000 on all obligations of plaintiff to the banks then existing or subsequently incurred, with all such notes due by December 1, 1969 at a maximum of 7 percent interest.

The agreement further provided that plaintiff would make payments to the transferors under the 1952 contract up to $120,000 annually, provided that no event or condition existed or would result by reasons of making the payments proposed that would constitute a default under the bank credit agreement. Additional payments would be subject to plaintiff's best judgment.

Further, the transferors agreed not to declare a default under the December 1, 1952 agreement for any reason, nor to sell their interests not subject to the present agreement. All of the Bartolo shareholders who were parties to the 1952 agreement were parties to the 1954 agreement.

The credit agreement was necessary in order that plaintiff might borrow funds needed to conduct the business

of the cemetery. The transferors, who were the signatories to the December 1, 1952 agreement, consentd to the partial deferral of payments without interest and to the subordination.

44. The trustees frequently discussed the subject of the extensive development projects which included the grading of hill lands. Although the grading of 633 acres could have been stretched out, the trustees concluded it was impractical as there was the necessity of developing the property and maintaining an inventory of developed property at least 3 to 4 years ahead of customer demand. Accordingly, the trustees voted unanimously to continue the grading project.

In fact, a large part of the grading was undertaken prematurely from an economic standpoint. Although by 1956 plaintiff was first able to make sales of property in the area that was the subject to its first 633 acres of grading, by 1966, after sales of 67 acres of the property and some 7,600 grave spaces, 45 years of grave space inventory was still available from the 633 acres.

45. Other factors also contributed to plaintiff's cash pinch, which began in 1955 and continued into the early parts of the 1960's. The pre-need selling and consequent accounts receivable presented a cash demand for immediate sales commission expenses on these deferred sales. The cash shortage existed despite the fact that by the December 1, 1954 credit agreement with Security and Citizens Banks (as amended May 26, 1956) plaintiff obtained a two-million dollar credit line. This was not adequate to fund the development program, the major expense being the grading of 633 acres of hill land.

46. Once the trustees determined to continue the extensive development project, they had one alternative left, and that was to secure some relief from the creditors in the purchase price. Thus, plaintiff commenced negotiations sometime late in 1957 with the creditors of the Bartolo

contract in an attempt to reduce the price from 30 to 20 percent on grave sales and other percentage reductions. Up until his death in late 1959, John Gregg conducted the negotiations with the other former Bartolo shareholders (transferors), including the United California Bank (UCB) which held a 24 percent interest as trustee of W. A. Johnson's Estate.

47. On December 27, 1957, Gregg wrote similar letters to both S. Fuller, trustee for the Corkett Trust, and UCB. He informed them that amending the December 1, 1952 contract had been discussed and he implored them to agree to the proposed modification of the contract. In support thereof, Gregg wrote that payments to the transferors under the contract were impossible to fulfill. Gregg explained plaintiff's financial reports demonstrated that it could not possibly meet the contractual provisions. By September 30, 1965, after payment on the contract of $3,130,000, there would be due, but unpaid, $4,542,000. Even then, plaintiff would need substantial loans and would have to cut back on its development. Further Gregg pointed out "[i]t is to the best interest of the former shareholders that we have a strong Association [plaintiff]."

48. In the early part of 1958, UCB very strenuously resisted the proposed modification. Frequent correspondence between Gregg and UCB produced wide discrepancies as to the terms. Gregg rejected numerous counter-proposals made by UCB. As to UCB's proposed elimination of the percentage reduction after 20 years, Gregg replied that it seemed "folly to provide now for something that no one except perhaps, yourself believes has any reasonable chance of occurring 20 years from now." As to UCB's proposal for payment of interest on the accrued liability, Gregg replied that "the Association [plaintiff] simply could not undertake to pay that additional obligation." In attempting to convince UCB to acquiesce to the terms of the proposed amendment, Gregg wrote—

> Again, may I point out to you that our real purpose in suggesting an amendment is to increase *current* payments to the unit holders (creditors). In other words, to put something in their pockets now, and this something to be substantially more than they would hope to get within the foreseeable future under the present arrangement.

49. Despite the opposition of UCB, Gregg, Wardman, Seppi, Bancroft, McNitt, and Sloan expressed a willingness to reduce the payments under the contract and in the spring of 1958 they agreed to the amendment. On May 19, 1958, plaintiff's trustees approved the amendment and resolved that since more than 51 percent of the creditors in interest had agreed to the amendment, the 51 percent requirement provided in the December 1, 1952 contract had been met and the amendment was to be effective June 1, 1958. On May 21, 1958, John Gregg wrote to UCB and advised them of the signed and effective amendment.

UCB claimed that the 51 percent clause in the December 1, 1952 agreement was not binding on them and threatened to sue plaintiff. Negotiations continued in the hope that serious litigation could be avoided and plaintiff would be able to get the unanimous approval for the reduction.

50. On February 20, 1958, a final order of condemnation was entered awarding plaintiff the one-half acre Rossan property that it had resolved to acquire in 1956 through the exercise of its power of eminent domain.

51. On April 8, 1958, plaintiff purchased 180 acres of land known as the Pellessier property. The purchase price was $161,500. The property was not acquired specifically to provide more grave spaces, but about half the acreage could be used for such. The entire 180 acres were dedicated for cemetery use in 1961.

In addition to the Pellessier and Rossan acquisitions, plaintiff purchased an additional 30 acres in 1955 and 1956.

52. On September 23, 1959, John Gregg died. McNitt was elected president and together with Sloan continued negotiations with UCB. Finally in 1961, an agreement was reached with UCB and 100 percent of the creditors agreed to the amendment of the December 1, 1952 contract, effective June 1958 and dated July 17, 1961.

53. The agreement referred to in the preceding finding provided as follows:

AMENDMENT TO AGREEMENT COVERING ACQUISITION BY ROSE HILLS MEMORIAL PARK ASSOCIATION OF STOCK OF BARTOLO COMPANY

This is an agreement effective June 1, 1958, between ROSE HILLS MEMORIAL PARK ASSOCIATION, a non-profit California cemetery corporation ("Association" herein) and the persons, or their successors, who were parties to the Agreement dated December 26, 1952, the other party to which was the Association and which covered the acquisition by the Association of stock of Bartolo Company, said persons referred to herein, collectively, as "Sellers".

Recitals

A. On December 26, 1952, but effective as of December 1, 1952, the Association entered into an agreement (the "Bartolo Contract" herein) with Sellers or their predecessors in interest who were the then owners of all of the issued and outstanding shares of stock of Bartolo Company, a California corporation, for the purchase by the Association of all of said shares of stock of Bartolo Company.

B. Pursuant to the provisions of the Bartolo Contract the Association acquired ownership of all of the shares of stock of Bartolo Company, and became obligated to Sellers to pay therefor a purchase price defined and described in the Bartolo Contract.

C. The Bartolo Contract contains restrictions on the right of the Association to acquire, develop, sell or otherwise dispose of real property, which restrictions have proved to be unduly burdensome and not in the best interests of either the Association or the Sellers.

D. In order to enable the Association to fulfill its obligations under the Bartolo Contract, and to best assure the orderly payment of the purchase price without hampering the proper development of the cemetery, the percentages of gross selling price, as defined in the Bartolo Contract, payable to the Sellers should be reduced for at least a period of years, the consideration for such reduction being the undertaking of the Association to pay amounts to the Sellers to which they would not otherwise be entitled under the Bartolo Contract. Said adjustments have been made desirable and necessary as the result of circumstances which have arisen and events which have occurred which were not contemplated at the date of the Bartolo Contract and which could not reasonably have been anticipated by the parties at said date and which have made it impossible for the Association to perform its obligations under the Bartolo Contract without the modifications herein set forth.

Agreement

NOW, THEREFORE, the Bartolo Contract is amended in the following particulars:

First: Paragraph G of Section I is hereby amended to provide as follows:

G. "The cemetery" shall mean the properties now or heretofore owned by Bartolo, and such additions thereto as have been or may hereafter from time to time be made by the Association adjacent, adjoining, or contiguous to, or abutting upon such properties, and which have been dedicated for ceme-

tery purposes or as to which cemetery permits have been issued, or which may hereafter be so dedicated or permitted, and the buildings and improvements thereon used in, or in conjunction with, the cemetery business being carried on by the Association. Without limiting the generality of the foregoing provision, there shall be included as a part of the cemetery that certain property, consisting of 180 acres, more or less, commonly known as the Pellissier property, adjoining the cemetery on the northeast, negotiations for the purchase of which have been undertaken by the Association. As part of the consideration for this amendment the Association agrees to proceed in due course and with reasonable diligence to obtain ownership of said property and to develop the same for cemetery use, subject to the payment requirements of this Agreement.

Second: Subsection (k) of subparagraph (1) of paragraph B of Section II is hereby amended to provide as follows:

(k) It will maintain a standard and modern system of accounting in accordance with generally accepted accounting practice; cause Bartolo to do the same; and will maintain for inspection by Sellers at its office:

(i) As soon as available, and in any event within one hundred twenty (120) days after the end of each fiscal year of the Association, a balance sheet of the Association and of Bartolo as of the end of such fiscal year and statements of income and surplus of the Association and of Bartolo for such fiscal year, all in reasonable detail and certified by independent certified public accountants of recognized standing secured by the Association.

(ii) Within one hundred twenty (120) days after the end of each fiscal year of the Association, a certificate of the President or Treasurer of the Association, stating that to the best of his knowledge and belief the Association has performed and observed each and every covenant contained in this Agreement on the part of the Association to be performed, and that no event then exists which constitutes an event of default thereunder or would constitute such event of default upon the lapse of time or upon the giving of notice and the lapse of time, specified therein; or if any such default or event exists, specifying the nature thereof of which the signer of such certificate may have knowledge.

Upon written request addressed to the Association by the holder or holders of ten per cent (10%) or more in interest hereunder, the Association will furnish to such person so requesting quarterly statements of sales by it during the preceding fiscal year of property subject to this Agreement on which percentages are to be paid, such statements to be mailed within one hunderd twenty (120) days following the receipt by the Association of such written request.

Third: Subsection (a) of subparagraph (1) of paragraph C of Section II is hereby amended to provide as follows:

(a) Make any material change in the type or character of its business as the same presently is being conducted, except such changes as may be made in order that the type or character of its business will conform with that which is being conducted by other comparable organizations in Southern California; or purchase or otherwise acquire or develop any real property unless the same shall adjoin, abut upon,

or be contiguous to the cemetery as it may now exist or may from time to time hereafter exist.

Fourth: Paragraphs A and B of Section IV of the Bartolo Contract are amended to provide as follows:

A. The Association will pay to the Sellers for the shares of common stock the purchase and sale of which are provided for by this Agreement a purchase price determined as follows:

(1) Thirty per cent (30%) of the gross selling price of grave spaces sold by the Association on and after December 1, 1952 and prior to June 1, 1958 in or upon real property owned by Bartolo on or prior to December 1, 1952; twenty per cent (20%) of the gross selling price of grave spaces sold by the Association on and after June 1, 1958 and prior to June 1, 1978 in the cemetery; thirty per cent (30%) of the gross selling price of grave spaces sold by the Association on and after June 1, 1978 in the cemetery or the amount determined under subparagraph (4) of this paragraph A of Section IV, whichever is less.

(2) Ten per cent (10%) of the gross selling price of niches and/or crypts sold by the Association on and after December 1, 1952 and prior to June 1, 1958 in any mausoleums and/or columbariums; seven per cent (7%) of the gross selling price of niches and/or crypts sold by the Association on and after June 1, 1958 and prior to June 1, 1978 in any mausoleums and/or columbariums; ten percent (10%) of the gross selling price of niches and/or crypts sold by the Association on and after June 1, 1978 in any mausoleums and/or columbariums or the amount determined under subparagraph (4) of this paragraph A of Section IV, whichever is less.

(3) Twenty-five per cent (25%) of the gross selling price of underground crypts designed for one entombment, and twenty per cent (20%) of the gross selling price of underground crypts designed for two or more entombments, sold by the Association on and after December 1, 1952 and prior to June 1, 1958 in or upon real property owned by Bartolo on or prior to December 1, 1952; seventeen per cent (17%) of the gross selling price of underground crypts designed for one entombment, and thirteen per cent (13%) of the gross selling price of underground crypts designed for two or more entombments, sold by the Association on and after June 1, 1958 and prior to June 1, 1978 in the cemetery; twenty-five per cent (25%) of the gross selling price of underground crypts designed for one entombment, and twenty per cent (20%) of the gross selling price of underground crypts designed for two or more entombments, sold by the Association on and after June 1, 1978 in the cemetery or the amount determined under subparagraph (4) of this paragraph A of Section IV, whichever is less.

(4) If the Association shall in good faith determine that the payment, commencing June 1, 1978, of the percentages of gross selling prices set forth in the preceding subparagraphs (1), (2) and (3) would be impractical, economically not feasible, and detrimental to the best interests of the Association and the Sellers, and shall give written notice of such determination to each of the Sellers on or before December 31, 1977, the matter shall forthwith be submitted to arbitration in the following manner:

(a) The Association shall, not later than December 31, 1977, designate one arbiter, which

shall be Messrs. Haskins & Sells, Certified Public Accountants, or such other national independent firm of Certified Public Accountants of comparable stature as shall then be performing the periodic audits of the records and operations of the Association or as shall be designated by the Association;

(b) The Sellers shall, not later than January 31, 1978, designate one arbiter, which shall be Messrs. Lybrand, Ross Bros. & Montgomery, Certified Public Accountants, or such other national independent firm of Certified Public Accountants of comparable stature as shall be designated by at least 51% in interest of Sellers excluding for this purpose Sellers who are also Trustees or executive employees of the Association;

(c) The arbiters so designated shall confer, make such examination of the property, records, and operations of the Association as they shall deem advisable, receive such testimony and evidence as shall be pertinent, relevant and material, and shall attempt to agree upon (i) percentages of gross selling prices to be payable on and after June 1, 1978, which shall be not more than the percentages in effect prior to June 1, 1958 nor less than the percentages in effect immediately prior to June 1, 1978; and (ii) the period during which such percentages shall be effective.

(d) If the two arbiters cannot agree they shall select a third arbiter, which shall be a national independent firm of Certified Public Accountants of stature comparable to the other arbiters, and to whom shall be submitted all information, reports, analyses and evidence theretofore sub-

mitted to and considered by the first two arbiters. If the two arbiters cannot agree upon a third arbiter they shall forthwith request the then presiding judge of the Superior Court of the State of California, in and for the County of Los Angeles, to designate such an arbiter, who shall meet the qualifications above set forth. The third arbiter shall consider such information, and may request additional information.

(e) The decision of a majority of the arbiters shall be determinative of the controversy and shall establish the percentages and the period of time within the limits specified in the preceding subparagraph (c). Such decision shall be rendered in writing to the Association and the Sellers, and shall be binding upon them, subject only to such court approval in the case of fiduciaries then holding interests of Sellers as may be permitted by law, which approval Sellers agree to seek with due diligence.

(f) The Association shall pay the fees and expenses of the arbitration.

(g) No firm of certified public accountants shall be qualified to act as an arbiter under the provisions hereof if any member, employee, partner, or executive of such accounting firm who has or has had any responsibility for the conduct of the arbitration, the preparation or examination of any material in connection therewith or any prior audits or examinations of the Association is related within the third degree to any of the Sellers or to any officer, director, trustee, or executive or administrative employee of the Association or any of the Sellers.

(5) On the sale, leasing, or other disposition of real property, or any estate or interest therein,

whether made by the Association or Bartolo (other than as described in subparagraphs (1), (2), and (3) of this paragraph A, and other than sales, leases, or other dispositions by Bartolo to the Association):

(a) Fifty per cent (50%) of gross rentals, royalties, or other amounts received for the use of such real property, or estate or interest therein;

(b) Except as provided in subsection (c) hereof, on sales or exchanges of real property the following percentages of the gross selling price (which, in case of an exchange, shall mean the market value of the property acquired on the exchange):

(i) Between December 1, 1952 and November 30, 1957, ninety per cent (90%);

(ii) Between December 1, 1957 and November 30, 1967, eighty per cent (80%);

(iii) Thereafter seventy-five per cent (75%).

(c) In the case of exchanges for real property similar or related in service or use, or potential service or use, and in area, to the real property exchanged, and in the case of sales of real property which are effected as a consequence of or in anticipation of the purchase of other real property adjoining, abutting upon, or contiguous to the cemetery similar or related in service or use, or potential service or use, and in area, to the real property so sold, the acquired property shall, for the purposes hereof, upon such acquisition become a part of the cemetery; provided, however, that:

(i) The Association shall first have determined, by resolution of its Board of Trustees, that the conditions and requirements of this subsection exist and will be met, and that the transaction will promote the most efficient and effective development of the cemetery;

(ii) The Association shall promptly have given written notice to each of the Sellers of such determination by the Board of Trustees;

(iii) The exchange or sale so contemplated shall not be consummated until the expiration of thirty (30) days from the date of the mailing of such written notice to each of the Sellers;

(iv) In the case of sale of property there shall become payable to the Sellers, in lieu of the percentage of gross selling price set forth above in this subparagraph (5), fifty per cent (50%) of the excess, if any, of the gain (as hereinafter defined) realized from such sale over the purchase price of the property purchased. In the case of such a sale in anticipation of purchase of other property, payment of such percentage may be deferred for a period of not to exceed one year from the date of completion of the sale, without interest or penalty; but if the anticipated purchase has not occurred within said one-year period, the percentage herein prescribed shall be paid to the Sellers, subject to the right of the Association to recoup such payment from the Sellers if the replacement property is purchased within five (5) years from the date of completion of such sale. Such recoupment shall be made only out of monies otherwise becoming due and payable to Sellers hereunder. For

the purpose hereof "gain" means the excess of the sale price, net of expenses of sale, over the costs incurred for development and improvement of the property to the date of its sale.

B. Payments to Sellers upon the purchase price, to the extent that the same is determined in the manner specified in subparagraphs (1), (2), (3) and (4) of paragraph A of this Section IV of the Bartolo Contract shall be made not less often than quarterly from the amounts accrued on gross billings upon which final collection has been received by the Association; and to the extent that the same is determined in the manner specified in subparagraph (5) of paragraph A of this Section IV, not less often than quarterly from each payment on account received by the Association from gross billings therefor. Such quarterly payments shall be made not later than forty-five (45) days after the end of each fiscal quarter of the Association; provided that such payments need not, however, exhaust the amounts then accrued, but shall be made in amounts which will, as nearly as feasible, exhaust said accruals; and provided further that if at any time after June 1, 1978 the Association is in arrears in payment of any amounts accrued and payable, it will, until such time as the arrearages are eliminated, deposit to a separate account monthly accruals which become payable and report to Sellers the amounts of such accruals and deposits within twenty-five days after the end of each month.

54. After 1961, plaintiff's cash position improved. Commencing about 1962, the pre-need sales started to level out, which eliminated the necessity of putting up cash to fund new receivables. Also, in 1960, plaintiff began selling funeral service debentures. These debentures were sold to

persons owning interment space at Rose Hills and were convertible into funeral, commodity and other services offered by plaintiff. By September 30, 1967, debentures totaling over 6.7 million dollars had been sold. On September 30, 1968, plaintiff had over 7 million dollars in cash and a net worth of 10 million dollars. At the end of 1952, plaintiff's net worth was $329,715. This net worth increase is solely attributable to plaintiff's earnings, all of which have been reinvested in its properties and operations.

The Bartolo Liquidation

55. The purpose underlying the acquisition of the Bartolo stock by plaintiff was acquisition of Bartolo's assets in the conduct of its cemetery business.

56. Liquidation of Bartolo was delayed because under a particular California law, immediate liquidation would have given rise to a state tax liability for Bartolo (and for plaintiff as transferee) of about $180,000, unless Bartolo was exempt from income taxes. Prior to the liquidation, plaintiff sought federal and state tax rulings that Bartolo was exempt from income taxes, but the rulings were not granted either by the Internal Revenue Service or the California Franchise Tax Board. When the state law was altered to conform to federal tax law, in 1957, Bartolo was liquidated.

57. Between the time of the stock purchase and the liquidation of Bartolo, plaintiff acquired its needed inventory from time to time by means of the reduction of Bartolo's surplus and by distributions in partial liquidation to plaintiff, Bartolo's only stockholder.

The Mortuary

58. The furnishing of mortuary services at the Rose Hills Cemetery was contemplated as early as 1945, when Rose Hills Mortuary, Inc., was incorporated to protect the name. That company did no business, and its charter was allowed to lapse in 1963.

59. Plaintiff has furnished burial preparation services at the cemetery since February 1956.

60. It is customary for the larger non-sectarian cemeteries in Southern California to make available burial preparation (mortuary) services on the premises; and there has been a definite trend, particularly in the Southern California area, beginning in 1933, toward the provision of such services at major cemeteries. At present, there are no large non-sectarian cemeteries in Southern California at which burial preparation services are not made available on the premises. There are other cemeteries providing similar services in the Southwest, Eastern Seaboard, Northwest and Midwest of the United States. In the east many mortuaries own cemeteries. The trend exists in Southern California without regard to whether the cemetery is for-profit or non-profit.

61. The reasons for this trend are several: It is easier for the public, and avoids long funeral processions; the public prefers to have the mortuary services conducted in the surroundings of a modern memorial park; the preparation of a body for actual interment is an incidental operation of the cemetery, and the public thinks of mortuary services in relation to burial. The mortuary is functionally incidental and related to the business of a cemetery because the preparation of remains for burial is related to the burial itself.

62. Plaintiff operates a mortuary on its premises in order to satisfy public demand and to be competitive with other cemeteries in its trading area.

63. The remains of 97½ percent of the deceased persons prepared for burial at Rose Hills Mortuary are disposed of at the cemetery. This percentage is based upon the 20,299 mortuary cases serviced at the mortuary between the time it opened and November 30, 1968. The remaining 556 cases, or 2½ percent, were not disposed of at the ceme-

tery, some because after Rose Hills was called it developed that the deceased was a Catholic and was necessarily interred in a Catholic cemetery; others because the family finally determined that the remains should be disposed of in a family burial plot elsewhere.

64. About 62 percent of the remains buried at the cemetery had been prepared for burial elsewhere than at plaintiff's mortuary.

65. There are 175,000 sold but unoccupied burial spaces at present, while about 10,000 to 12,000 families have made pre-need burial preparation arrangements with Rose Hills Mortuary.

66. Although at some cemeteries the mortuary is separately owned, the trustees of Rose Hills determined that plaintiff should own and operate the mortuary itself, rather than another party, in order to insure that the mortuary was operated in a manner that would not be injurious to its reputation and good will. They also felt that since Rose Hills is a charitable trust it would be improper to permit private individuals to benefit from the conduct of a mortuary under the name of Rose Hills.

67. About 30 percent of plaintiff's gross income currently comes from the provision of mortuary services which are offered at competitive prices. The net income of the mortuary is estimated to be about 2 percent of the mortuary gross income, so the mortuary accounts for about 10 percent of plaintiff's net income. None of the funds received by the mortuary go to the Bartolo creditors.

Rose Hills—1968

68. Plaintiff now owns approximately 2,480 contiguous acres in Whittier, California.[8] The entire property is zoned agricultural (which permits cemetery use), and is dedi-

[8] In the terms of acreage, plaintiff has the largest single location for a cemetery in the United States.

cated for cemetery use. Conditional use permits for cemetery utilization have been obtained on 1,300 acres.

69. Plaintiff is a memorial park—with the exception of a few upright tombstones in the original cemetery property; the memorial tablets are placed flush on the ground which enables the cemetery to be maintained in a generally beautiful park-like appearance and makes for maintenance efficiency.

Approximately 350 gross acres of the property have been fully developed—the property in which the roadways provide access, water systems are installed, grass has been planted, trees and shrubs are in place, and it is ready for interment. Six hundred acres have been rough-graded and are not fully developed.

70. Plaintiff is the largest cemetery in terms of sales of interment spaces. Since 1914, there have been over 92,500 interments (grave, crypt and niche burials) at the cemetery. About 175,000 interment spaces are sold but still unoccupied.

71. Plaintiff still has 2,160 acres of unsold land which has been dedicated for cemetery use. Such land will provide an inventory for approximately 180 more years.

72. Plaintiff sells interment spaces largely on a pre-need basis. Since 1962, it has maintained a sales force of approximately 100 persons for such efforts. Before then, it had 125 salesmen. Plaintiff is in competition with other cemeteries in the service area and others which overlap the area. These include both for-profit and non-profit cemetery corporations, with the exception of sectarian and public cemetery districts. Forest Lawn is plaintiff's principal competitor and it has a sale force of approximately 100.

Plaintiff's prices are determined by the competitive forces in its market. In the cemetery industry non-profit cemetery corporations such as plaintiff generally have business policies similar to those of for-profit cemetery cor-

porations with respect to prices, management methods, and sales methods. Plaintiff's operations conform to that general standard.

73. From December 1, 1952 through September 30, 1968, plaintiff paid the former Bartolo shareholders $5,508,000 under the 1952 agreement. In the year in suit, taxpayer paid $120,000 under the agreement. As of September 30, 1968, an additional $1,884,784 was due under the contract to the sellers, but remained unpaid because of subordination agreements. Moreover, if the reduced percentages provided under the amendment to the agreement had not been in effect from 1958-1967, an additional 2.577 million dollars would have been due, but unpaid as of September 30, 1968.

Jurisdictional Facts

74. On February 19, 1952, plaintiff applied to the Internal Revenue Service for a ruling that it was exempt from federal income tax under section 101(5) of the Internal Revenue Code of 1939. A ruling stating that plaintiff was so exempt was issued by the Service on August 27, 1952.

On July 20, 1953, Bartolo applied to the Service for a ruling that it was exempt from taxation. That application was ultimately denied.

75. On August 14, 1964, the District Director of Internal Revenue for Los Angeles recommended that plaintiff's exemption ruling be revoked.[9] Following the filing of a protest by plaintiff and a conference with representatives of the Internal Revenue Service, plaintiff filed on February 3, 1966, a federal income tax return for its fiscal year ending September 30, 1965.[10] Plaintiff paid the tax of $237,264

[9] On March 10, 1966, the Internal Revenue Service issued a ruling revoking the prior acknowledgment of plaintiff's tax exemption effective for all fiscal years beginning after September 30, 1961.

[10] Plaintiff claimed in the return that its cost of sales of cemetery properties was $568,247.

shown thereon and filed a claim for refund for this amount. No portion of that amount has been refunded.

76. An audit of plaintiff's return for that year was conducted by the Internal Revenue Service and a deficiency in the amount of $6,031 was proposed. Plaintiff paid the deficiency on September 23, 1966, and on or about October 4, 1966, filed an amended claim for refund including this additional amount.[11]

77. On April 21, 1967, the Internal Revenue Service assessed an additional deficiency for the fiscal year ending September 30, 1965, of $201,959. The additional deficiency resulted from the Service's determination, *inter alia*, that $421,786, the amount which plaintiff accrued [12] during the fiscal year ending September 30, 1965 as its obligation to the sellers under the 1952 contract, of the $568,247 claimed by plaintiff as cost of sales of cemetery property, was not allowable as part of the cost of sales.[13] On June 9, 1967, plaintiff filed a second amended federal income tax return for the fiscal year ending September 30, 1965. The return reduced taxpayer's cost of sales in accordance with the Service's determination; in addition, plaintiff elected to report certain of its income on the installment basis. On this return, plaintiff reported taxable income of $523,554 and a tax liability of $245,219, of which $1,924 was unpaid. It later paid that amount.

78. On September 1, 1967, plaintiff paid the assessment of $201,959, and on October 4, 1967, it filed a further amended claim for refund in the amount of $447,178 repre-

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[11] Plaintiff conceded, however, that if it was not exempt, this additional assessment was correct.

[12] The amount accrued under the contract was $422,525. This discrepancy is not explained. In any event, it is to plaintiff's advantage that a lower figure be used.

[13] A total of $5,406 was allowed as an addition to the cost of sales resulting in a net disallowance in the cost of sales of $416,380.

senting all taxes paid for said year, plus interest thereon. On October 9, 1967, the District Director of Internal Revenue for Los Angeles, disallowed the amended claim for refund. The Government has now conceded that plaintiff would, in any event, be entitled to report certain of its income on the installment basis. Accordingly, on December 31, 1969, the Government gave plaintiff a partial administrative refund of $201,959 with interest thereon.

Ultimate Findings

79. The substance of the transaction formally consummated by the agreement of December 1, 1952 between plaintiff and all of the shareholders of the Bartolo Corporation was a bona fide sale by the shareholders to plaintiff of two distinct items: (1) the real estate needed by plaintiff to commence and sustain the operation of a large scale cemetery, and (2) the credit necessary to permit plaintiff to defer payment for that real estate until it had been resold in the regular course of plaintiff's business and fully paid for by the ultimate purchasers of grave spaces and mausoleum crypts and niches.

80. The 1952 fair market value of the property acquired by plaintiff from the Bartolo shareholders substantially exceeded the present value of the future payment commitment that plaintiff gave in return. Specifically, for property worth not less than $10,452,000, the Bartolo shareholders received a future payment obligation from plaintiff that had a present worth of approximately $6,950,000.

81. Having parted with their property for something less than its then-current fair market value, the December 1, 1952 agreement afforded the sellers no opportunity to thereafter receive anything more from plaintiff than reasonable compensation (*i.e.*, 7 percent per annum) for the credit of not less than $6,950,000 that they had extended plaintiff by virtue of the terms of the agreement. The evidence shows that in fact they received nothing more than any similarly

secured creditor who had fully underwritten the purchase of a $7,000,000 asset would have received and, further, that the degree and nature of the control that the sellers exercised over plaintiff's affairs were no greater or different than that which would have been demanded by any other creditor in similar circumstances.

82. There is no evidence that plaintiff ever paid more than fair value for goods or services purchased by it.

83. Plaintiff has always been operated in accordance with business principles calculated to bring it financial success and strength. It has, therefore, realized substandard [*] net earnings. All of such earnings have been appropriated to the development and betterment of its property and no part thereof has inured to the benefit of any individual, including former Bartolo shareholders.

84. Since the preparation of remains for burial is a necessary preliminary to burial, plaintiff's operation of a mortuary business is necessarily incident to its overall purpose as a cemetery for the burial of human remains.

Recommended Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover and that judgment should be entered for it in the amount of $245,219, together with interest thereon as provided by law.

[* The parties agreed in the Court of Claims that this word is a typographical error and should be replaced by the word "substantial". Brief for the Plaintiff, p. 8; Brief and Exceptions for the United States, p. 11.]

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 376-66

(Decided July 14, 1972)

ROSE HILLS MEMORIAL PARK ASSOCIATION v. THE UNITED STATES

John H. Hall, attorney of record, for plaintiff. *Dana Latham, Austin H. Peck, Jr., William A. Long*, and *Latham & Watkins*, of counsel.

Philip R. Miller, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Ira Mark Bloom*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, and KUNZIG, *Judges*.

Opinion

KASHIWA, *Judge*, delivered the opinion of the court:*

The issue in this tax refund suit is whether plaintiff qualifies for exemption from the federal income tax under Section 501(c)(13) of the Internal Revenue Code of 1954.[1]

"SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC."

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(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

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* We have herein used material from the opinion of Trial Commissioner George Willi, though we reach a contrary result.

[1] Internal Revenue Code of 1954 (26 U.S.C.):

"(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit;

For the reasons hereinafter to be discussed, we hold for the defendant and against the plaintiff.

Plaintiff was incorporated under the laws of the State of California in October, 1950, to operate as a non-profit cemetery corporation near Los Angeles, California. Detailed facts with relation to its organization, operation, control, and other relevant matters will be hereafter discussed as they relate to the issues raised by § 501(c)(13).

In early 1952, plaintiff applied for and received a ruling that it was exempt from income tax under § 101(5) of the Internal Revenue Code of 1939, which is the predecessor of § 501(c)(13) of the Internal Revenue Code of 1954, above quoted. Twelve years later, in August 1964, plaintiff received notice of the contemplated revocation of such exemption ruling. It protested this action but eventually filed on February 3, 1966, an income tax return for its fiscal year ended September 30, 1965, paying a tax of $237,264. The Internal Revenue Service did in fact revoke the exemption on March 10, 1966, retroactively effective to all years beginning after September 30, 1961. On September 23, 1966, plaintiff paid an assessed deficiency for 1965 of $6,031.

In its 1965 return, plaintiff deducted $568,247 as the cost of its sales of cemetery property. Included in that cost was $421,786 which plaintiff accrued as its obligation under a 1952 stock purchase agreement, the effect of which is at issue in this case. Briefly, the agreement provided for plaintiff's purchase of the stock of Bartolo Corporation, a for-profit California cemetery, in exchange for a percentage of gross sales. The IRS disallowed the $421,786 de-

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and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

duction and assessed a further deficiency of $201,959. On June 9, 1967, plaintiff filed an amended return in accordance with the Service's determination but deferred a portion of its tax by electing to report its income under the installment basis. Thus, the return showed an aggregate tax liability for 1965 of $245,219. Since plaintiff had already made payments of $237,264 and $6,031, it paid only $1,924 with the return. Following the Government's challenge to using the installment sales method, plaintiff paid an additional sum on September 1, 1967, but the Government has now refunded this amount with interest, conceding that taxpayer was entitled to elect the installment basis. Thus, there remains at issue the $245,219, which is covered by appropriate claims for refund. The filing of this suit was timely.

Plaintiff's claim to the exemption from tax under § 501 (c)(13) is based on the portion of that paragraph following the semicolon:[2]

> * * * any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

We shall first take up the question of benefit to private individuals. Whether any of plaintiff's net earnings inured to such private benefit depends on the effect given a stock purchase agreement plaintiff made on December 26, 1952, with the shareholders of the Bartolo Company and by which

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[2] Since plaintiff sells gravesites to the public on a commercially competitive basis and makes a profit thereby, it does not qualify under either of the exempt categories mentioned in the language preceding the semicolon. See *Knollwood Memorial Gardens* v. *Commissioner*, 46 T.C. 764, 784 (1966).

plaintiff acquired the greatest portion of its land.[3] Bartolo was the last of a series of corporations, with generally common ownership, that had been operating a for-profit cemetery business for many years. In 1951, it acquired some 1,800 acres of raw land for future expansion at a cost of $281,000. Additional purchases were made in 1951 and 1952 of a total of 257 acres for $390,000. When plaintiff was formed, all of its seven trustees were shareholders of Bartolo and members of a Los Angeles law firm which represented the shareholders. Though some outside trustees evidently were subsequently appointed, at all pertinent times the Bartolo shareholders and members of said law firm constituted a majority of plaintiff's trustees.

Under the agreement, all of Bartolo's outstanding stock was sold to plaintiff. In consideration therefor, plaintiff agreed to pay on the following basis: 30 percent of the gross selling price of gravesites sold from any property acquired from Bartolo; 10 percent of sales of mausoleums, niches, and crypts; 20 and 25 percent of sales of various underground crypts; 50 percent of rents and royalties received for the use of any of plaintiff's real property; and, on sales of real property under any other circumstances, during the first five years, 90 percent of the proceeds, during the following 10 years, 80 percent, and, thereafter, 75 percent. There was no provision for a minimum annual payment and no stated interest rate. The agreement was to continue until all of the property was sold and fully paid for. It further provided that, upon consent of 51 per cent in interest of the sellers, they could subordinate their claims to debts which plaintiff might incur to others and postpone or defer, in whole or in part, payment of amounts due them by plaintiff. The default clause recognized that

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[3] In separate transactions, plaintiff had earlier bought 61 acres and 9.6 acres from Bartolo for $2,055,306 and $563,740, respectively. Both of these purchases provided that the sale price was to be paid in ten years, and we see no reason to doubt that they were bona fide sales.

the price to be paid was "in an amount not presently determinable and over a period, the duration of which cannot presently be determined." Consequently, in lieu of actual damages in the event of plaintiff's default, 51 percent of the sellers could immediately demand payment of any amounts then due and recover the Bartolo stock or the unsold land.

From 1952 through 1966, Bartolo and plaintiff embarked on a major development of the cemetery. Existing buildings were improved and new ones were built, including two chapels. Some 633 acres of the new land were cleared and graded to provide more gravesites. The cost of these projects was some $7,669,000 with the land development accounting for over one-half. To finance these projects, Bartolo and plaintiff borrowed a total of $1,500,000 from two banks in 1954 and again in 1956. The former Bartolo shareholders (plaintiff's trustees) agreed to subordinate their rights under the 1952 agreement to these loans and any subsequently incurred debt to the banks to the extent of $2,500,000, with the understanding that the bank notes would not be due until December 1, 1969. In addition, they agreed that during the existence of the bank debt, plaintiff would limit its payments to the former Bartolo shareholders (hereinafter sometimes called transferors) under the 1952 agreement to only $120,000 per year and defer the remainder without interest.

By 1957, plaintiff began to feel a cash pinch. Its ambitious development program, together with the obligation to the transferors and its current operating expenses, outpaced its line of credit from the banks. Finally, in 1961, the transferors agreed to an amendment of the 1952 agreement which reduced the percentages of gross sales payable to them by approximately one-third. This was to be retroactive to 1958 and to continue until 1978. Thereafter, the original terms were substantially reinstated. The consideration for this amendment was the extension of the per-

centage-of-sales obligation to all lands acquired by plaintiff at any time after the 1952 agreement (about 210 acres by 1961). For the period from 1958 through 1967, the effect of the reduced percentages was to lower the accrued amount payable to the transferors by $2,577,000.

After 1961, plaintiff's cash position improved for a number of reasons. These included sales of pre-need funeral service debentures which totaled $6,700,000 by September 30, 1967; the leveling out of pre-need sales, which reduced the necessity for additional funds; and deferral of payments to the transferors on reduced percentages. By 1968, plaintiff had over $7,000,000 in cash, and a net worth of $10,000,000.

From the inception of the 1952 agreement until September 30, 1968, the transferors received from plaintiff $5,500,000. As of that date, an additional $1,884,784 was due them but had been deferred because of the subordination agreements. Moreover, if the reduced percentages provided under the amendment to the agreement had not been in effect from 1958 to 1967, an additional $2,577,000 would have been owing.

Since the purchase involved some 2,154 acres and each acre could accommodate about 1,135 gravesites, there was involved about 2,445,000 salable gravesites. At the 1952 selling rate, 12,500 spaces per year, it was anticipated that the agreement would continue for about 200 years. And if the $160 price per lot remained constant, the sellers expected to receive about $615,000 per year or a total of $123,000,000. The Trial Commissioner found that the agreement constituted a sale with the purchase price of $6,951,583 and that the payments, even though extending over an extremely long period, represented installments on the purchase price plus seven percent interest. Defendant, however, characterizes the transaction as an exchange of stock for an equity interest in plaintiff. Accordingly, defendant contends that to the extent that plaintiff has earn-

ings in excess of capital, the payments to the transferors constitute corporate distributions of net earnings in violation of § 501(c)(13).

This issue is not uncommon to cemetery companies because frequently they are unable to get adequate financing for land acquisition. They have little credit of their own and the land is undesirable collateral because of its limited use. Consequently, land is sometimes acquired by conveying to the seller a percentage interest in the cemetery's subsequent sales of the land. In its brief, the Government emphasizes that five Circuits and the Tax Court have now held that various forms of such indebtedness, payable by a share in the sales proceeds, issued to acquire land are really equity investments. *Gardens of Faith, Inc.* v. *Commissioner*, 345 F.2d 180 (4th Cir. 1965), *aff'g per curiam* 23 T.C.M. 1045 (1964), *cert. denied*, 382 U.S. 927 (1965); *Sherwood Memorial Gardens, Inc.* v. *Commissioner*, 350 F.2d 225 (7th Cir. 1965); *Peterson* v. *Commissioner*, 380 F.2d 1 (9th Cir. 1967); *Jefferson Memorial Gardens, Inc.* v. *Commissioner*, PH Memo T.C. ¶ 66,050 (1966), *aff'd* 390 F.2d 161 (5th Cir. 1968) (issue conceded on appeal); *Hamilton Memorial Gardens* v. *Commissioner*, 394 F.2d 905 (6th Cir. 1968) (issue conceded on appeal), *cert. denied*, 393 U.S. 936 (1968); *Knollwood Memorial Gardens* v. *Commissioner*, 46 T.C. 764 (1966).

Historically, this type transaction won initial approval by the Board of Tax Appeals which twice allowed nonprofit cemeteries to preserve their tax exempt status despite land acquisition agreements providing for payment from a percentage of lots sold. *Commissioner* v. *Kensico Cemetery*, 96 F.2d 594 (2d Cir. 1938), *aff'g* 35 B.T.A. 498 (1937), *non-acquiesced in*, 1937-1 CUM. BULL. 40; *Forest Lawn Memorial Park Association, Inc.*, 45 B.T.A. 1091 (1941), *nonacquiesced in*, 1942-2 CUM. BULL. 25, *withdrawn and acquiesced in*, 1946-2 CUM. BULL. 2, *withdrawn and nonacquiesced in*, 1960-2 CUM. BULL. 8. As is evident from

the above citations, the Internal Revenue Service had great difficulty in responding to these cases. This is understandable, because at the time when these cases arose, the large commercial cemetery industry was just developing. Subsequently, it became apparent to the Government that investors could improperly take advantage of the tremendous profit potential in the sale of such small lots as gravesites.

Later cases have usually involved for-profit cemeteries, but the basic percentage-of-sales agreement is still the source of the controversy. For example, in *Sherwood Memorial Gardens, supra,* the plaintiff cemetery was a newly organized for-profit corporation that issued 1,000 "certificates of indebtedness" to two non-shareholders (the wife of the 99 percent shareholder and an unrelated attorney) in exchange for their transfer of land and $30,000 cash to develop the land into a cemetery. The certificate holders were entitled to 25 percent of the gross sale price of the land for 15 years. The cemetery deducted the amount it paid to certificate holders as the cost of the land sold, and this was challenged as being distributions of equity capital.

Despite the fact that the certificate holders were not shareholders, the Tax Court characterized the transfers as contributions to equity capital, citing *Brown Shoe Co.* v. *Commissioner,* 339 U.S. 583, 589 (1950). The petitioner contended that this was error because (1) the 25 percent interest existed regardless of net income, (2) the interest terminated after 15 years, (3) the certificate holders could not vote or manage the cemetery, and (4) they shared equally with creditors in the event of insolvency. The Seventh Circuit, however, agreed with the Tax Court. It found two of the classic elements of debt lacking: interest and fixed principal amount. Moreover, it approved of the Tax Court's reliance on the following factors to support the decision: (1) thin capitalization of the cemetery (60-1), (2) the speculative nature of the enterprise, (3) the suspi-

cion that the land-share method, usually employed by non-profit cemeteries, was prompted by a tax avoidance motive, and (4) the obvious tax avoidance gained by increasing the cemetery's basis in the lots and allowing capital gains treatment to the certificate holders.

This same arrangement was considered, from the certificate holders' point of view, in *Peterson* v. *Commissioner*, 380 F.2d 1 (9th Cir. 1967). Here, the facts presented an even more flagrant situation. The newly formed corporation issued debt certificates to its controlling shareholders who were entitled to 20 percent of gross sales of all land sold as cemetery lots. The corporation had been initially capitalized at $60, and the land (10 acres) was transferred with a cost basis to the holders of $2,500. The court affirmed the Tax Court's conclusion that an equity, not debt, interest was created because the certificates did not (1) guarantee payment, (2) provide for interest, (3) fix a principal amount, or (4) fix a set maturity date.

Of these recent cases, only *Knollwood Memorial Gardens* involved a tax-exempt corporation, and as plaintiff points out, it was the first case to deny the § 501(c)(13) exemption on the basis of a finding that the percentage-of-sales agreement constituted an equity interest in the corporation. By virtue of this, plaintiff seeks to distinguish itself from the cases which involved taxable cemeteries. However, we do not believe that this differences has any effect on the question of whether or not there was an equity interest. The statutory test prohibits the exemption whenever profits inure to the benefit of any "private shareholder *or individual*" (emphasis added). Indeed, in *Knollwood*, the Tax Court has already reached this conclusion:

> * * * we do not see any meaningful or convincing difference between equity interests owned by non-stockholders in a thinly capitalized stock corporation [as in *Sherwood Memorial Gardens*] and similar interests owned by individuals who contribute to non-

stock corporations [as in *Knollwood*] in return for such interests.

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The statute thus specifically recognizes that corporate profits may wind up in the hands of non-stockholders, and whenever this happens, unless the corporation qualifies otherwise under the section, exemption is denied. We think the exemption should be denied in the case of non-stock membership corporations as well as in the case of stock corporations wherever the facts disclose that individuals share in the corporate profits because of equity interests. The net earnings of Knollwood's operation cannot be properly computed by first deducting payments to the landshare holders because those payments were not payments for the purchase price of land. Thus the distributions by whatever name called are of net earnings. [46 T.C. at 786].

We feel that the principles applied in the for-profit cemetery cases apply equally well to our consideration, in this case, of the equity interest question.

In *Knollwood,* the Tax Court considered a transfer similar to that involved in this case. The cemetery corporation acquired the land plus the seller's obligation to develop part of it into a cemetery. In exchange, it agreed to pay 20 percent of the sale proceeds of gravesites, the agreement to continue for 20 years after the last lot was sold. Just as in the instant case, the "seller" was one of the organizers of the cemetery company. In holding that the purported debt was really an equity interest, the court used many of the tests for indebtedness which had been previously applied to for-profit cemetery cases:

Despite the fact that the land purchase agreement which created the interests of the landshare holders is couched in terms of purchase and sale, and in form appears to make the transferor of the land a creditor,

virtually none of the elements of a true debt are present. There was no unconditional promise to pay; payment was contingent upon future sales by the alleged "debtor." There was no fixed date of maturity; petitioner's obligation continued for an undeterminable period of time. There was no fixed amount of principal obligation; the amount ultimately to be received by the alleged "creditors" depended upon the number of lots sold. Even if the total number of lots to be carved out of the 20 acres were accurately determinable in advance and it be assumed that all of these lots would be sold, the ultimate amount to be received by the landshare holders would not be determinable since the amount is also dependent upon the price at which lots are sold, a factor which might vary over the future years. Furthermore, since there was no fixed principal amount owed, there was no interest payable. We recognize that a sale may be made and the consideration therefor may be based on a percentage of the resale price, but here on the evidence of record we can only conclude that no such transaction took place. [46 T.C. at 780-781, footnote omitted].

We believe that the Tax Court's objections can be made just as forcefully in this case. The substance of this transaction resembles an equity interest because all the traditional elements of a valid debt are missing. See *Sayles Finishing Plants, Inc.* v. *United States*, 185 Ct. Cl. 196, 203, 399 F.2d 214, 218 (1968), quoting from *Gilbert* v. *Commissioner*, 248 F.2d 399, 402 (2d Cir. 1957), *cert. denied*, 359 U.S. 1002 (1959). (1) There was no unqualified obligation on plaintiff to pay because the installments depended on the sale of gravesites. (2) There was no maturity date because the obligation was to continue until all lots were sold. As stated above, by virtue of a 1961 amendment to the agreement, the obligation to pay a percentage of the sale price was extended to all contiguous

property acquired by plaintiff at any time after the 1952 agreement. (3) There was no sum certain because the market price of gravesites could change. Indeed, the evidence showed that by 1968 lots were selling at $243 each, a 52 percent increase over their 1952 price and a 125 percent increase over their 1947 price (see finding 57). (4) There was no stated interest rate. (5) There was no minimum annual payment. (6) There was no right to share with general creditors in the assets because subsequent to the agreement the former Bartolo shareholders exercised their discretion to subordinate their claim to other debts. (7) In addition, there was no paid-in capitalization to the business. It was formed specifically to be the recipient of land, most of which had been acquired by Bartolo only a year or so before. (8) And lastly, the transferors had complete control over plaintiff's operations because they constituted its trustees. Therefore, they could determine how much was paid on the purported "debt." This control is generally inconsistent with a true debtor-creditor relationship. *P. M. Finance Corp.* v. *Commissioner*, 302 F. 2d 786, 789 (3d Cir. 1962); *Knollwood Memorial Gardens, supra*, at 782. By themselves, each of these factors might be acceptable in a valid debt instrument, but taken together, they are overwhelmingly persuasive that this transaction created an equity interest in plaintiff. See *Sayles Finishing Plants, Inc.* v. *United States, supra; American Processing & Sales Co.* v. *United States*, 178 Ct. Cl. 353, 371 F. 2d 842 (1967); *Indian Lake Estates, Inc.* v. *Stewart*, 448 F. 2d 574, 578-579 (5th Cir. 1971).

Plaintiff, relying on *Commissioner* v. *Brown*, 380 U.S. 563 (1965), argues that if a valid sale has occurred, the above-mentioned criteria for determining the degree of risk-shifting become inapplicable. In that case, the sale price was payable out of income generated by the business being sold, so there was no shifting of risk to the buyer,

a charity. Despite this, the Supreme Court upheld the sale because of the good faith, arm's-length bargaining between the buyer and seller which resulted in a reasonable and fixed price payable over a ten-year period. The sellers had definitely parted with property for a fixed price. In our case, however, we find these elements missing. There was no definite price at the time of the 1952 agreement, and there was no limiting period within which the amounts had to be paid. Indeed, the transferors' interest in plaintiff was to last as long as plaintiff was in the business of selling gravesites. Thus, there is no basis upon which to conclude that a valid sale occurred. This is quite different from *Brown* in which, "If the stipulated price was paid, the Brown family would forever lose all rights to the income and properties of the company." 380 U.S. at 569. We think that *Brown* presented a different factual context. Though we agree that shifting of risk is not a *sine qua non* to a sale, we believe that it becomes relevant in a situation like that before us. The transferors entered into a bona fide agreement, but the terms of the agreement left them with an equity interest in plaintiff. Similarly, our decision in *Union Bank* v. *United States*, 152 Ct. Cl. 426, 285 F. 2d 126 (1961), is distinguishable because it involved a definite purchase price which was due at the end of a ten-year period.

The disparity between the amounts involved herein further compels the result we reach. In *Knollwood, supra*, the landshare holders' total investment for land and improvements was $13,520, and the potential return was more than $200,000—14 times their investment. On this fact, the Tax Court made the following conclusion:

> When, as here, the alleged "purchase price" bears no reasonable relationship to the fair market value of the assets conveyed, it is stretching normal definition beyond its breaking point to regard the transaction as a sale. The transaction was a contribution to capital

> placed at the risk of the business, and as such no debt was created; payments to landshare holders, "investors" in the cemetery enterprise, were distributions with respect to their respective proprietary interests. [46 T.C. at 783].

Similarly, here the property was worth some $10,000,000 at the time of the transfer, and the transferors expected to receive more than $123,000,000—12 times their investment. To support its contention that a sale occurred, plaintiff emphasizes the trial commissioner's finding that the present value, in 1952, of the anticipated payments was only $6,951,583, which is less than the property's fair market value at the time. Therefore, it says, the gross disparity between purchase price and fair market value present in *Knollwood* does not exist. But we do not attach the same significance to present value as does plaintiff. Of far more importance is the total payout which the former Bartolo shareholders would receive. This latter amount, which was the focus of the Tax Court's attention in *Knollwood*, could considerably exceed $123,000,000 because of the previously mentioned 52 percent rise in the market price of the lots, and we believe that this is indicative of an equity interest. The increase in market value of the gravesites in itself shows the weakness of plaintiff's sale argument. If the payout is characterized as part payment of principal and part interest for the credit extended, the sum of which is $123,000,000, then an increase in the sale price would lead to an earlier satisfaction of the debt. But this is not the case here. When the market price rose to $243 per lot, the total potential payments under the agreement rose to nearly $187,000,000. Thus, the payments would continue long after the "purchase price" would have been satisfied. This situation can only be described as participation in net earnings.

We do not mean, by our decision today, to hold that the percentage-of-sales agreement is, *per se*, a violation of §501 (c)(13). See *Rose Hills Memorial Park, Inc.* v. *Commis-*

sioner, 23 T.C.M. 1434 (1964) (an unrelated Connecticut corporation) and *Washington Park Cemetery Assn., Inc.* v. *Commissioner,* 22 T.C.M. 1345 (1963). We do believe, however, that the *Kensico* and *Forest Lawn* cases, *supra,* have been considerably weakened by subsequent cases. We only hold that, on the basis of the situation before us, a contribution to capital was made instead of a sale and consequently net earnings of the corporation wound up in individuals' hands in violation of § 501(c)(13).

Another issue raised relates to the basis to plaintiff of the land it acquired on the liquidation of Bartolo. Plaintiff contends, consistent with its sale theory, that it is entitled to a basis in the assets equal to its cost of the Bartolo stock acquired in the 1952 agreement. It does not contend that this result is governed by § 334(b)(2)[4] because the Bartolo

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[4] (2) EXCEPTION.—If property is received by a corporation in a distribution in complete liquidation of another corporation (within the meaning of section 332(b)), and if—

"(A) the distribution is pursuant to a plan of liquidation adopted—

"(i) on or after June 22, 1954, and

"(ii) not more than 2 years after the date of the transaction described in subparagraph (B) (or, in the case of a series of transactions, the date of the last such transaction); and

"(B) stock of the distributing corporation possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote, and at least 80 percent of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), was acquired by the distributee by purchase (as defined in paragraph (3)) during a 12-month period beginning with the earlier of,

"(i) the date of the first acquisition by purchase of such stock, or

"(ii) if any of such stock was acquired in an acquisition which is a purchase within the meaning of the second sentence of paragraph (3), the date on which the distributee is first considered

liquidation did not occur within the two-year period of § 334(b)(2)(A)(ii). Rather plaintiff seeks to have us apply the doctrine of *Kimball-Diamond Milling Co.* v. *Commissioner*, 10 T.C. 7 (1948), *aff'd* 187 F.2d 718 (5th Cir. 1951), *cert. denied*, 342 U.S. 827 (1951), to achieve the same result. Plaintiff reminds us that we have previously held that the *Kimball-Diamond* doctrine has not been pre-empted by enactment of § 334(b)(2). *American Potash & Chemical Corp.* v. *United States*, 185 Ct. Cl. 161, 179-186, 399 F.2d 194, 206-209 (1968), rehearing granted and case remanded, 185 Ct. Cl. 186, 402 F.2d 1000 (1968).

The purpose of § 334(b)(2) and the *Kimball-Diamond* doctrine is to treat a taxpayer as if it had bought assets directly when direct ownership is the objective and when it can only be achieved by purchasing the owner-corporation's stock and then liquidating the corporation. *American Potash*, *supra* at 180-181. On the facts before us, we have found that the transfer was of an equity interest and did not constitute a sale. Furthermore, we are not certain that plaintiff's objective was to own the land directly. The fact of Bartolo's existence did not impair the operations of plaintiff or its payments to the transferors. And it would presumably have continued to operate Bartolo as a subsidiary but for the repeal of the California law imposing a tax on the liquidation. This being the case, we are not presented with a situation in which we must consider whether to apply the *Kimball-Diamond* rationale.

As plaintiff's trustees, the former Bartolo shareholders made a contribution to the capital of plaintiff when they transferred their stock in exchange for the equity interest. Therefore, plaintiff's basis in the stock was a carryover

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under section 318(a) as owning stock owned by the corporation from which such acquisition was made, then the basis of the property in the hands of the distributee shall be the adjusted basis of the stock with respect to which the distribution was made."

from the former shareholders under § 113(a)(8) of the 1939 Code.[5] See *Knollwood, supra* at 791, n.15. Thereafter, when Bartolo was liquidated, plaintiff succeeded to Bartolo's basis in the land under § 334(b)(1).

Accordingly, the petition will be dismissed.

Findings of Fact

1. Plaintiff was incorporated on October 25, 1950, under Part 1, Division 2, Title 1, Section 9200 *et seq.* of the California Corporation Code. The parties have stipulated for purposes of this proceeding (1) that as such an entity, plaintiff was prohibited by California law from issuing stock and (2) that in fact it issued none.

2. On November 1, 1950, plaintiff took over the operation of what has since become, by virtue of subsequent real estate acquisition, the nation's largest single-tract memorial park. Utilizing the accrual method of accounting and operating on a September 30 fiscal-year basis, plaintiff operates a mortuary and engages in various other activities incidental and subordinate to that of selling interment rights for the burial of human remains. Now comprising more than 2,200 acres, plaintiff's cemetery property is located just northwest of the city of Whittier, California, about 12 miles east of the downtown center of Los Angeles. The property has sufficient capacity to accommodate almost 2,500,000 gravesites.

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[5] "If the property was acquired after December 31, 1920, by a corporation—

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"(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

History and Development of Plaintiff's Cemetery Property

3. The real properties to which plaintiff succeeded in ownership following its formation had been accumulated over a period of years by a series of for-profit corporations dating back to 1914 when Cemeteries Improvement Corporation (Cemeteries) was formed for the purpose of establishing a cemetery near Whittier on 18½ acres of land that it acquired from A. H. Gregg. The cemetery's first interment occurred in 1915 and a mausoleum was built on the property in 1916. Its operations continued and expanded thereafter.

4. At a Cemeteries directors' meeting on August 13, 1928, J. L. Seppi, A. H. Gregg, and his son, John D. Gregg, resolved to take steps necessary to the formation of a new corporation to acquire Cemeteries' assets, assume its liabilities, and to acquire certain other properties needed to secure financing for a new mausoleum.

5. In 1929, Cemeteries effected a reorganization. Whittier Heights Memorial Park (Whittier) acquired the net assets of Cemeteries, which by that time had increased to include approximately 31½ acres of land, in exchange for 704 shares of stock in Whittier. A. H. Gregg received approximately 54 percent of Whittier's stock, the same percentage of ownership that he held in Cemeteries. Pursuant to the plan of reorganization, A. H. Gregg then sold four-fifths of his stockholdings in the two companies in equal share to John Gregg, W. A. Johnson, J. L. Seppi, and A. Wardman for a total of $100,006.50.

In addition to the actions described above, at a directors' meeting on August 29, 1929, Whittier authorized the purchase of approximately 80 acres of land owned by A. H. Gregg. Based upon appraisals that included an estimate of the rapidly rising land costs, the directors authorized the issuance of 3,447 shares of treasury stock with a stated value of $115.50 per share to A. H. Gregg, equivalent in face value to a price of $5,000 per acre.

6. Following the reorganization detailed above, Cemeteries continued to exist as a holding company, its only asset being the 704 shares of Whittier stock. In 1930, A. H. Gregg resigned as president and director, A. Wardman was elected president, and W. A. Johnson was appointed as a director to succeed H. Sewell.

7. The Whittier corporation, under various names, operated the cemetery from 1929 until 1950. By 1930, the second mausoleum had been built. On August 12, 1930, the name of the company was changed to Rose Hills Memorial Park (Rose Hills), and on November 26, 1950, it was further changed to Bartolo Company.

8. From 1930-1937, J. D. Gregg, A. Wardman, W. A. Johnson, and J. L. Seppi were the controlling shareholders of Rose Hills. From 1937-1950, L. E. Bancroft and G. Sloan, in addition to the aforementioned individuals, were the controlling shareholders of Rose Hills and Bartolo.

9. From 1930 through 1950, Rose Hills, under the general management of John D. Gregg, engaged in the sale of grave spaces, made interments, sold all incidental facilities that were available and incident to business at that location. During this period, Rose Hills and Bartolo acquired an additional 74 acres of land and its stockholders controlled an additional 1,800 acres that could be used for cemetery purposes.

10. On December 16, 1942, A. Wardman, J. L. Seppi, John D. Gregg, and W. A. Johnson, the directors of Cemeteries, resolved to sell Cemeteries' 704 shares in the corporation then known as Rose Hills (originally Whittier) for $50 a share. On December 22, 1942, the directors formally resolved to wind up and dissolve. Cemeteries was thereupon dissolved.

11. On September 1, 1943, the following individuals agreed to form a limited partnership, to be called the Banslope Company, with percentage interests as hereafter in-

dicated: W. A. Johnson (trustee), 46 percent; M. Corkett (trustee), 12 percent; F. Fuller (trustee), 12 percent; L. Bancroft, 11 percent; and G. Orton, J. Seppi, A. Wardman, G. Sloan, the balance. Banslope was formed for the stated purpose of manufacture, installation, purchase and sale of merchandise, including cemetery accessories, and, although it had other investments, its active business involved selling memorial tablets and markers.

On May 13, 1946, Banslope Company was incorporated and succeeded to the assets, subject to the liabilities, of the limited partnership. In exchange for their respective partnership interests, the partners received proportionately equivalent value in the form of Banslope Company stock;[1] the total fair value of the partnership having been determined at not less than $110,000.

The officers of Banslope, who were also the directors, were as follows: W. A. Johnson, president; R. L. McNitt, Jr.,[2] vice president; and W. R. Fuller, treasurer.

12. It was Gregg's objective to have Banslope acquire land owned by Central Oil Company, consisting primarily of 1,750 acres of hill land in Whittier, California, so that the cemetery could later obtain that land for its ultimate expansion and development. Gregg constantly participated in discussions with the directors and managers of Banslope that resulted in Banslope's decision to acquire a controlling interest in Central. By January 13, 1947, Banslope owned such an interest in Central.

13. On January 13, 1947, at a directors' meeting of Central Oil, four of the former directors resigned and John D.

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[1] Although John D. Gregg was not directly a Banslope stockholder, his children owned about 50 percent of the stock which was held in trust. John D. Gregg, however, was not a trustee of these trusts.

[2] On December 18, 1946, G. Orton transferred his 550 shares to R. L. McNitt, Jr.

Gregg, R. L. McNitt, W. A. Johnson, and L. E. Bancroft became the new directors.

On or about April 2, 1947, the name of Central Oil was changed to Central Land and Grazing Company (Central). The capital structure was revised to provide a stated capital of $240,000 and a $40,000 loan to Banslope was approved.

14. For each of the fiscal years ended September 30, 1947 through September 30, 1950, Rose Hills' after tax profits were $88,595; $143,252; $178,034; and $180,869, respectively. Rose Hills was able to obtain loans from two banks, Security First National Bank of Los Angeles (Security) and Citizens National Trust & Savings Bank of Riverside (Citizens) as well as from other sources, principally Rose Hills' affiliates. During 1946 and 1947, Citizens made short-term unsecured loans totaling $200,000, which Rose Hills repaid by 1948. As of September 30, 1950, Rose Hills had secured and unsecured notes payable in excess of $300,000.

THE PERIOD OCTOBER 25, 1950-NOVEMBER 30, 1952

15. On October 25, 1950, Rose Hills Memorial Park Association, plaintiff, was incorporated under California law as a non-profit cemetery corporation. Pursuant to the bylaws, the exercise of all corporate powers, which included the right to select and remove all officers, agents and employees was vested in a board of trustees. At date of incorporation all members of the board of trustees were associated with the Los Angeles law firm of Latham & Watkins. The California Corporation Code requires that nonprofit, non-stock cemetery corporations have members as well as trustees or directors. At all times, the same individuals have been plaintiff's members and its trustees. No separate membership register was required by State law and none was kept. The names of the members were always readily ascertainable, however, by reference to plaintiff's books and records.

16. By a letter agreement of November 1, 1950, between plaintiff and Bartolo, plaintiff agreed to take over operation of the cemetery and conduct that business in a manner similar to that which Bartolo had employed. In addition, plaintiff agreed to purchase land needed for cemetery purposes from Bartolo and to pay for it at the rate of 50 percent of the proceeds from the sale of lots, plots, and graves, and 60 percent of the gross proceeds from the sale of niches, crypts, vaults, family sections, and other mausoleum columbarium property, based upon schedules of reasonable minimum prices to be agreed upon in advance and exclusive of amount collected for endowment or special care.

17. On February 9, 1951, the directors of Banslope approved the proposed merger of Banslope with Bartolo. On February 19, 1951, the shareholders of Banslope who had held its 11,000 outstanding shares of stock since December 18, 1946, approved the merger. On the same day, the Bartolo shareholders, namely, John D. Gregg, L. E. Bancroft, J. L. Seppi, G. W. Sloan, A. Wardman, and W. A. Johnson and his daughters, Mrs. F. Fuller and Mrs. M. Corkett, approved the merger.

On February 19, 1951, Banslope was merged into Bartolo, which was the surviving corporation. Bartolo had previously effected a 35 for 1 stock split, increasing its outstanding shares from 3,452 to 120,820. Banslope shareholders received in cancellation of their shares approximately 2.7459 shares of Bartolo for each Banslope share. The stock split and subsequent merger caused Bartolo to have outstanding 151,025 shares of its stock.

18. On April 9, 1951, Bartolo purchased Central's assets (other than mineral rights) subject to its liabilities. Central's assets included 1,750 acres of hill land in Turnbull Canyon which were purchased for approximately $163,200 and 53.75 acres of pasture land on Workman Mill Road, purchased for approximately $118,270.

Central conveyed the mineral rights to the hill lands to Puente Farms Company (Puente) (incorporated on March 8, 1951), in exchange for 24,000 shares of Puente stock. With the exception of J. Seppi, the same persons who were both trustees of plaintiff and directors of Bartolo were directors of Puente. After the sale of assets to Bartolo, mentioned above, Central distributed all of its remaining assets, *i.e.*, cash and Puente stock, to its shareholders.

Several oil wells have been drilled on the hill lands but none have produced any oil. The last drilling lease was quitclaimed by the lessee in 1958.

19. On May 14, 1951, Bartolo entered into loan agreements with Citizens and Security Banks whereby these banks were committed to lend until September 1, 1952, up to $700,000 at 4 percent per annum, payable monthly.[3] In addition to stated requirements as to Bartolo's net worth and current ratio, the banks acknowledged that the loans were based upon Bartolo's present executive management and no changes could be made without their consent.

20. On July 1, 1951, plaintiff and Bartolo entered into an agreement effective November 1, 1950, to spell out in further detail their letter agreement of that earlier date. Article 3, Section D of the agreement provided for the purchase by plaintiff of approximately 61 acres of land for $2,055,306 payable in 10 or less annual installments, without specified minimum or maximum amounts and without interest on the upaid balance, the first installment payable September 30, 1951. The purchase price for the 61 acres, which had been fully developed for cemetery use and was in condition to receive interments, was determined by taking 50 percent of the estimated aggregate sales price of the

[3] This agreement was amended on January 1, 1952, at which time the initial borrowing had been curtailed to $400,000. By the amendment the banks were committed to lend an additional $250,000, with interest at 4½ percent.

individual grave sites when finished. Bartolo's basis for the 61 acres was $223,542. Plaintiff also acquired the option to purchase the bulk of the additional land owned by Bartolo which was dedicated and/or for which a permit had been issued for cemetery purposes as of November 1, 1950. Bartolo was obligated to develop such additional land designated for purchase by plaintiff and would receive 50 percent of plaintiff's then estimated average selling price of all grave spaces on the land so purchased, also payable in 10 or less annual installments without interest, from and after delivery of the deed by Bartolo.

Part IV of the agreement covered the purchase of the two mausoleums for $603,480 payable in 10 or less annual installments without interest.[4] The purchase price for the mausoleums was determined by taking 60 percent of the total estimated gross proceeds from this property. Bartolo's basis for the mausoleums was $256,652.

21. On September 28, 1951, plaintiff entered into loan agreements with the same two banks of the May 14, 1951 agreement. Under the agreements, generally embodying the same conditions as the earlier ones, the banks were committed to lend until September 1, 1952, up to $300,000 with interest at 4 percent per annum payable monthly. Covenants were made as to continuation of plaintiff's management. Bartolo executed a subordination agreement, whereby it agreed that the $2,250,000 debt due it from plaintiff would be subordinated to the debts to the banks.

22. On September 28, 1952, Bartolo sold to plaintiff an additional 9.6 acres of cemetery land at a price of $563,740,

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[4] The remaining articles provided for plaintiff's leasing Bartolo's buildings, tools and equipment, water system, an option by Bartolo to construct additional buildings, mausoleums or make other improvements upon the cemetery which were desired by the plaintiff. Finally, it appointed plaintiff to collect Bartolo's accounts receivable due as of October 31, 1950 on sales prior to that date.

payable in 10 or less annual installments without interest.[5] The land was either fully developed or to be fully developed at the seller's expense. The purchase price was computed by using the 50 percent and 60 percent figures agreed upon in the letter agreement of November 1, 1950. At the time of sale Bartolo's basis for the 9.6 acres was $50,408.

23. In addition to the 1,803.75 acres of Bartolo acquired from Central in April 1951, it purchased an additional total of 257.50 acres of vacant land from unrelated third persons in 1951 and 1952 for which it paid $390,000.

24. On December 1, 1952, John D. Gregg, plaintiff's president, informed the Board of Trustees that negotiations had been proceeding for the purchase of Bartolo's outstanding stock. He told them that a fixed price would not be set, but that the price, payable in percentages of gross sales, would be geared to the proceeds of the sales recovered by plaintiff from the Bartolo property. A draft of the agreement of sale was unanimously approved and Gregg and Sloan were authorized to execute the contract for the purchase of Bartolo's stock.

The December 1, 1952 Agreement Between Plaintiff and Bartolo's Shareholders

25. On December 26, 1952, plaintiff entered into an agreement (effective 12/1/52) with the Bartolo shareholders to obtain their entire stockholdings in that company. As of December 1, 1952, the following were both the directors of Bartolo and the sole trustees of plaintiff: A. Wardman, John D. Gregg, W. A. Johnson, J. L. Seppi, G. W. Sloan,

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[5] Pursuant to a contract entered into on February 27, 1953, but effective September 1951, plaintiff purchased an additional 8.1 acres from Bartolo of which 1.5 acres had been transferred prior to December 1, 1952. As to terms of payment the contract was similar to those of the September 28, 1952 and July 1, 1951 agreements—the payment was due 10 years after date of deed or on February 26, 1963.

L. E. Bancroft, and R. L. McNitt, Jr. The Bartolo stockholders and their holdings as of December 1, 1952 were as follows:

		Shares	*Percent*
A. Wardman		3,806½	2.52
J. D. Gregg		59,500	39.40
William A. Johnson, individual	25,950		
William A. Johnson, trustee	15,294		
Six Johnson Trusts	2,400		
Margaret J. Corkett, Johnson daughter	700		
Margaret J. Corkett, trustee	3,625		
Frances J. Fuller, Johnson daughter	700		
Frances J. Fuller, trustee	3,625		
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	52,294		34.63
J. L. Seppi		12,286	8.13
G. W. Sloan		4,690½	3.10
L. E. Bancroft		16,938	11.22
R. L. McNitt		1,510	1.00
Total		151,025	100

The only two individual shareholders in Bartolo who did not become trustees of the plaintiff were F. Fuller and M. Corkett, the daughters of W. A. Johnson.

26. The agreement referred to in finding 25, above, contained the following provisions, set forth under the captions indicated below:

RECITALS

(1) Bartolo Company (hereinafter called "Bartolo") is a California corporation. It owns buildings, improvements, and land comprising and adjacent to the cemetery operated by the Association.

(2) The Association is a non-profit California cemetery corporation which has operated a cemetery known as Rose Hills Memorial Park since November 1, 1950. The Association has been classified as an exempt corporation under Section 101(5) of the Internal Revenue Code.

(3) Effective as of November 1, 1950, Bartolo assigned to the Association all of its right, title, and interest in and to that certain agreement dated May 19, 1944 between Bartolo and Rose Hills, Inc., a non-profit California corporation, custodian of the Endowment Care Fund for Rose Hills Memorial Park, and the Association assumed all obligations of Bartolo under said agreement.

(4) On July 1, 1951, but effective as of November 1, 1950, Bartolo and the Association executed an agreement relating to the purchase, leasing, and use of certain portions of the land, buildings, improvements, and equipment owned by Bartolo but required by the Association in the operation of a general cemetery business.

(5) Bartolo has 151,025 shares of common stock, all of one class, outstanding. Sellers are the owners of all of said outstanding stock of Bartolo.

(6) Sellers desire to sell to the Association, and the Association desires to buy from Sellers all of said outstanding shares of common stock of Bartolo owned by Sellers. Association believes that the immediate acquisition of said shares of stock will enable the Association to meet and dispose of the three following major problems with which it is confronted, to wit:

(a) insure that its substantially increased needs for land for cemetery purposes will be taken care of for the future;

(b) give the Association protection in the acquisition of buildings and equipment needed in the conduct of the cemetery business, which equipment the Association does not now have; and

(c) make available to the Association indirectly additional capital to enable it to operate, develop, and grow in accordance with presently indicated trends.

SECTION I. DEFINITIONS

For all purposes of this Agreement, unless the context otherwise requires:

A. "Endowment Care Deposits" shall mean those payments set aside with the Custodian of the Endowment Care Fund, except that for the purposes of this Agreement, said deposits shall not exceed 15% of the aggregate annual gross selling price of grave spaces, crypts, underground crypts, and niches, provided that in no event shall said deposits be less than the minimum prescribed by law.

B. "Custodian" shall mean Rose Hills, Inc., a nonprofit California corporation, its successors and assigns, the custodian of the Endowment Care Fund.

C. "Endowment Care Fund" shall mean the aggregate of the funds held by the Custodian, the use of which is governed by the California Health and Safety Code and which was formerly known as "perpetual care."

D. "Mausoleums" shall mean the mausoleums designated as Mausoleum No. 1 and Mausoleum "El Portal de la Paz" (sometimes referred to as Mausoleum No. 2), respectively, now located at the cemetery, as well as any additions to said mausoleums, or either of them, and any other mausoleums, buildings, structures or crypts placed upon such land, which may hereafter be

constructed at the cemetery upon land now owned by Bartolo, used, or intended to be used, for the interment of human remains.

E. "Columbariums" shall mean the columbariums now located at the cemetery, as well as any additions to said columbariums, or any of them, and any other columbariums, buildings or structures which may hereafter be constructed at the cemetery on land now owned by Bartolo, used, or intended to be used, for the interment of cremated human remains.

F. "Underground Crypts" shall mean adjoining crypts below the surface of the ground, not enclosed in a building, and used, or intended to be used, for the entombment of uncremated human remains.

G. "The Cemetery" shall mean the properties now or heretofore owned by Bartolo which have been dedicated for cemetery purposes and/or as to which cemetery permits have been issued, or which may hereafter be so dedicated or permitted, and the buildings and improvements thereon used in, or in conjunction with, the cemetery business being carried on by the Association.

H. "Gross selling price" shall mean:

(1) In the case of grave space, gross billings for sales thereof, excluding therefrom only Endowment Care Deposits and any amount credited to the gross billing on account of grave spaces, niches, crypts, or underground crypts exchanged in connection with such sales;

(2) In the case of niches and/or crypts, gross billings for sales thereof, excluding therefrom only Endowment Care Deposits and any amount credited to the gross billing on account of grave spaces, niches, crypts, or underground crypts exchanged in connection with such sales;

(3) In the case of underground crypts, gross billings for sales thereof, excluding therefrom only Endowment Care Deposits and any amount credited to the gross billing on account of grave spaces, niches, crypts, or underground crypts exchanged in connection with such sales;

(4) In the case of real property, or any interest or estate therein (except as described in subparagraphs (1), (2), and (3) of this paragraph H), gross billings for sales thereof, or gross rentals, royalties, or other amounts received and attributable thereto, whether received in cash or in kind.

I. "Purchase Price" shall mean the aggregate amounts to be paid to Sellers by the Association under the terms hereof.

SECTION II. REPRESENTATIONS, WARRANTIES, AND COVENANTS

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B. Affirmative covenants of the Association:

(1) The Association represents, warrants, and covenants that at the date hereof, and so long as any amount is payable to or may become payable to Sellers:

(a) It is a non-profit cemetery corporation, duly organized and existing under the laws of the State of California, and that under date of August 27, 1952, the Commissioner of Internal Revenue of the United States ruled that it is an exempt corporation under the provisions of Section 101(5) of the United States Internal Revenue Code.

(b) It is conducting, operating, and maintaining, and will continue to conduct, operate and maintain a cemetery business at and from the cemetery only, including the selling of grave spaces, crypts, underground crypts, niches, con-

crete boxes, burial vaults, memorials, flowers, entombments, niche inurnments, cremations, cremation containers, and the charging of fees for all services incidental to the disposition of dead human remains.

(c) It will continue to operate as a non-profit cemetery corporation; will not amend its charter, or cause or permit its charter to be amended, in any manner that would cause or permit it to lose its status as a non-profit cemetery corporation under the laws of California; will amend, or cause to be amended, its charter to the extent, if any, hereafter necessary in order to preserve its status as a non-profit cemetery corporation under the laws of California, and will operate in such manner as to assure, to the extent that the same is within the control of the Association, that it will continue to qualify as an exempt corporation under the provisions of the United States Internal Revenue Code.

(d) It is making and will continue to make charges in connection with the establishment, maintaining, operating, improving, and conducting its cemetery business, interring human remains, and the care, preservation, and embellishment of cemetery property.

(e) It will, to the fullest extent economically feasible and practical for its operation, use all land, buildings, or other properties which it has acquired or may hereafter acquire from Bartolo for cemetery purposes.

(f) On all sales of grave space, crypts, underground crypts, and niches, it will collect from the purchasers thereof Endowment Care Deposits and will pay said deposits to the Custodian, as

provided and required by the California Health and Safety Code.

(g) It will expend for the purpose of preserving and maintaining the cemetery, when and as necessary, all income from the Endowment Care Fund received from the Custodian, and may expend such other amounts received from other sources as may be necessary for the purpose of such preservation and maintenance provided, however, that the Association shall be the sole judge in determining what is desirable or necessary for such preservation and maintenance, and its decision in that regard shall be final.

(h) It will maintain and preserve its corporate existence and all rights, franchises, and other authority adequate for the conduct of its business; maintain its properties, equipment, and facilities in good order and repair; and conduct its cemetery business in an orderly manner without voluntary interruption (excluding labor disputes), and, except as elsewhere herein permitted, not change the type or character of its business.

(i) It will maintain on all of its real and personal property adequate insurance in good and responsible insurance companies against fire and other risks to the extent reasonable and prudent in the conduct of its business; and fully insure in responsible insurance companies against liability arising out of or in connection with the conduct of its business.

(j) It will duly and punctually pay and discharge, before the same become delinquent and before penalties accrue thereon, all taxes, assessments, and governmental charges upon or against it or any of its properties, and all its other liabili-

ties at any time existing, except to the extent that, and so long as (i) the same are being contested in good faith and by appropriate proceedings in such manner as not to cause any materially adverse effect upon its financial condition or the loss of any right of redemption from any sale thereunder, and (ii) it shall have set aside on its books reserves (segregated to the extent required by sound accounting practice) deemed by it adequate with respect thereto.

(k) It will maintain a standard and modern system of accounting in accordance with generally accepted accounting practice; cause Bartolo to do the same; and will maintain for inspection by Sellers at its offices:

(i) As soon as available, and in any event within 120 days after the end of each fiscal year of the Association, a balance sheet of the Association and of Bartolo as of the end of such fiscal year and statements of income and surplus of the Association and of Bartolo for such fiscal year, all in reasonable detail and certified by independent public accountants of recognized standing secured by the Association.

(ii) Within 120 days after the end of each fiscal year of the Association, a certificate of the President or Treasurer of the Association, stating that to the best of his knowledge and belief the Association has performed and observed each and every covenant contained in this Agreement on the part of the Association to be performed, and that no event then exists which constitutes an event of default thereunder or would constitute such event of default upon the lapse of time or upon the giving of notice and the lapse of time, specified therein; or if any such default

or event exists, specifying the nature thereof, of which the signer of such certificate may have knowledge.

(l) It will promptly advise Sellers in writing of the existence of any event of default or of any event which would become an event of default upon the lapse of time or upon the notice and lapse of time specified in this Agreement.

(m) It will cause Bartolo to observe, on its own behalf, the representations, covenants, and warranties set forth in subsections (i) and (j) of this subparagraph (1) of paragraph B.

C. Negative covenants of the Association:

(1) The Association represents, warrants, and covenants that so long as any amount is payable hereunder or may become payable hereunder, it will not do any of the following:

(a) Make any material change in the type or character of its business as the same presently is being conducted, except such changes as may be made in order that the type or character of its business will conform with that which is being conducted by other comparable organizations in Southern California.

(b) Sell, lease, or otherwise dispose of, or cause, suffer, or permit Bartolo to sell, lease, or otherwise dispose of land, improvements, buildings, machinery, equipment, choses in action, water rights, mineral rights, or other property except in the ordinary course of the Association's business of operating the cemetery or Bartolo's business incidental thereto, unless the Association shall in good faith determine that as to any transaction it would be impractical, economically not feasible,

and detrimental to the best interests of the Association and Sellers to observe this covenant; provided that such determination as to any transaction shall not constitute a determination as to any other transaction.

(c) Create, assume, or suffer to exist any mortgage, pledge, encumbrance or lien or charge of any kind upon any property or other assets now owned or hereafter acquired by it; provided, however, that this restriction shall not be applicable to nor prevent:

(i) Liens for taxes or assessments or for mechanics' or materialmen's claims; or liens or deposits in connection with workmen's compensation insurance, social security obligations, or other similar charges, all arising in the ordinary and normal operation of its cemetery business if the same are not overdue or, if overdue, are being contested in good faith and by appropriate proceedings in such manner as not to affect adversely its financial condition;

(ii) Liens or deposits in connection with surety, stay, or appeal bonds, or deposits required by law or governmental regulation or by any court order, decree, or judgment as a condition to the transaction of business or the exercise of any right, privilege, or license reasonably necessary in the transaction of its business;

(iii) Zoning restrictions, easements, licenses, restrictions on the use of real property or minor irregularities in title thereto, which do not materially impair the use of such property in the operation of its business or the value of such property for the purpose of such business;

(iv) Liens or encumbrances on property now owned by the Association or hereafter acquired by it if the Association shall in good faith, and prior to the creation thereof, determine that neither the creation thereof, the acquisition and use of funds thereby, nor the repayment thereof, would be detrimental to the best interests of Sellers hereunder; provided, that any such determination by the Association shall be formally expressed in the minutes of the trustees of the Association; and provided further that if (aa) the Association shall at any time hereafter desire to incur indebtedness and shall be required as a condition thereof to obtain a subordination of its obligations to Sellers hereunder to said proposed indebtedness, Sellers agree that such indebtedness may be incurred and such subordination may be effected and shall be binding upon all of them if 51 per cent in interest of Sellers consent in writing thereto; and (bb) the Association shall at any time hereafter desire to defer, in whole or in part, payment of amounts due on its obligations to Sellers hereunder, Sellers agree that such postponement may be effected and shall be binding upon all of the Sellers if 51 per cent in interest of Sellers consent in writing thereto.

(d) Purchase any securities, other than those covered by this Agreement nor make any investment in the securities or business of, or loans or advances to, any person or other entity, except in the ordinary and normal operation of its business; or guarantee or otherwise become liable upon the obligation of any person or other entity except by endorsement of negotiable instruments for deposit or collection in the ordinary and normal course of its business.

(e) Liquidate or dissolve, or commence any proceedings therefor.

(f) Cause, suffer, or permit Bartolo to do, permit to be done, or authorize any of the things enumerated in the foregoing subsections (a) through (d) of this subparagraph (1) of paragraph C, except to the extent that the Association is permitted to do them.

D. The affirmative and negative covenants set forth in this Section II are for the benefit of Sellers and the Association, and are not for the benefit of any third party.

SECTION IV. Payment of Purchase Price

A. The Association will pay to the Sellers for the shares of common stock, the purchase and sale of which is provided for by this Agreement, a purchase price determined as follows:

(1) Thirty per cent (30%) of the gross selling price of grave spaces hereafter sold by the Association in or upon real property now or heretofore owned by Bartolo.

(2) Ten per cent (10%) of the gross selling price of niches and/or crypts, hereafter sold by the Association in any mausoleums and/or columbariums.

(3) Twenty-five per cent (25%) of the gross selling price of underground crypts designed for one entombment; and twenty per cent (20%) of the gross selling price of underground crypts designed for two or more entombments hereafter sold by the Association in or upon real property now or heretofore owned by Bartolo.

(4) On the sale, leasing, or other disposition of real property, or any estate or interest therein,

whether made by the Association or Bartolo (other than as described in subparagraphs (1), (2), and (3) of this paragraph A, and other than sales, leases, or other dispositions by Bartolo to the Association):

(a) 50% of gross rentals, royalties, or other amounts received for the use of such real property, or estate or interest therein;

(b) Except as provided in subparagraph (c) hereof, on sales or exchanges of real property the following percentages of the gross selling price (which, in case of an exchange, shall mean the market value of the property acquired on the exchange):

(i) During the first five years after the date of this Agreement, 90%;

(ii) Commencing with the sixth year after the date of this Agreement and until the end of the fifteenth year, 80%;

(iii) Thereafter, 75%.

(c) In the case of exchanges for property similar or related in service or use, or potential service or use, to the property exchanged, and in the case of sales made within 90 days of the purchase by the Association, or Bartolo, of property similar or related in service or use, or potential service or use, to the property so sold, the acquired property shall, for the purposes hereof, upon such acquisition become a part of the cemetery, shall thereafter be deemed to be "property now or heretofore owned" by Bartolo, and no payment shall be made to Sellers in connection with any such exchange or sale.

B. Payments to Sellers upon the purchase price, to the extent that the same is determined in the manner

specified in subparagraphs (1), (2), and (3) of paragraph A of this Section IV, shall be made not less often than semiannually from the amounts accrued on gross billings upon which final collection has been received; and to the extent that the same is determined in the manner specified in subparagraph (4) of paragraph A of this Section IV, not less often than semiannually from each payment on account of gross billings therefor. Such payments need not, however, exhaust the amounts then accrued, but shall be made in amounts which will, as nearly as feasible, exhaust said accruals.

C. Payments on the purchase price shall be made by the Association at the times prescribed in the preceding paragraph B direct to Sellers. Unless the Association shall have received written notice of a change of address of a Seller such payments shall be mailed to the Seller's address as set forth in Section VII, paragraph B hereof. If any Seller shall have transferred, whether voluntarily or by operation of law, to another or other persons all or any portion of his interest hereunder, such payments shall be made by the Association as follows:

(1) If written notice of such transfer has not been received by the Association on or before fifteen days preceding the then current payment date, to the person or persons then appearing on the Association's records as the holder of the interest;

(2) If written notice of such transfer has been received by the Association on or before fifteen days preceding the then current payment date, to the person or persons designated in such written notice.

The Association shall be discharged from any further liability as to any such payment if the same is made as provided in this paragraph C. If in any case the Asso-

ciation is in doubt as to the person or persons entitled to receive any such payment it may refuse to make the same until such time as it has received written instructions, satisfactory to the Association in form and substance, as to the person or persons entitled to such payment, and the Association shall not be liable for interest, penalties, or surcharge of any kind for failure or refusal to make any payment prior to receipt of such satisfactory instructions.

SECTION V. GENERAL PROVISIONS

A. This Agreement may be modified or amended by written consent of the Association and at least 51% in interest of Sellers. In determining said 51%, any interest of any of Sellers which shall have been acquired, directly or indirectly, by the Association or Bartolo, and which is then owned, directly or indirectly, by the Association or Bartolo, shall not be considered as a Seller's interest.

B. Waiver by Sellers, or any of them, of the breach of any of the terms or conditions hereof shall not be deemed to be a waiver of any subsequent breach of the same or any other term or condition. Any consent by the Sellers, or any of them, to any amendment or modification of this Agreement or any of the terms or provisions thereof shall not constitute a consent to any other or subsequent modification or amendment.

C. Time is of the essence hereof.

D. Provision is made herein for payment of the purchase price measured in part by the sale of grave spaces, niches, underground crypts, and crypts in land heretofore purchased by the Association from Bartolo, or in buildings or structures which may hereafter be erected by the Association at its own expense. Such provision, and the percentages utilized herein for de-

termining the amount of the purchase price, have been determined in such a way as to measure a fair, just, and reasonable purchase price to be paid to Sellers for their stock in Bartolo, and in recognition of the value of the use which may be made by the Association of properties which it has heretofore acquired or may hereafter acquire from Bartolo.

Section VI. Default

A. This Agreement provides for the payment of the purchase price by the Association to the Sellers in an amount not presently determinable and over a period, the duration of which cannot presently be determined. It is recognized and agreed that it would be impracticable or extremely difficult to fix or determine the actual damage to the Sellers resulting from any material breach of this Agreement by the Association. The Association and the Sellers therefore agree that in the event of material breach by the Association of this Agreement, the Sellers, at their option and in addition to any other remedies that they may have for such breach, may after ten days' written notice of such breach, signed by not less than 51% in interest of Sellers, specifying the particulars thereof, and the failure by the Association to remedy said breach within said period, do, or cause the following to be done:

(1) Immediately demand and receive payment in full of any amounts due hereunder but not paid.

(2) If Bartolo shall at that time still be in existence, demand and receive from the Association the shares of stock of Bartolo the sale of which is herein provided for and the reconveyance and delivery of all real property theretofore acquired by the Association from Bartolo and not theretofore sold or contracted to be sold by the Association.

(3) If Bartolo shall not longer be in existence, demand and receive from the Association any and all properties theretofore acquired by the Association from Bartolo and not theretofore sold or contracted to be sold by the Association, together with any and all contracts, accounts receivable, notes receivable, or other choses in action then held by the Association but attributable to or derived from, directly or indirectly, properties theretofore acquired by the Association from Bartolo.

(4) Sellers shall be fully entitled to retain and keep, without any claim whatsoever thereagainst by the Association, all amounts of the purchase price theretofore paid by the Association.

B. A material breach of this Agreement by the Association shall be deemed to have occurred if:

(1) The Association shall default in payment of any installment of the purchase price, and such default shall not have been cured within the period of notice hereinabove provided; and/or

(2) There shall have occurred any breach by the Association of any of its warranties or representations, as set forth in Section II hereof.

27. A non-profit cemetery customarily commences operations without any substantial capital in the sense that it has no substantial funds of its own, and normally acquires its assets principally on credit. In California, non-profit cemeteries have over the years usually and customarily acquired their assets by paying a purchase price computed as a percentage (not over 50%) of gross sales of interment spaces made out of the acquired land. This has been customary because newly-formed non-profit associations find it difficult to borrow money from financial institutions because they have no credit background and because dedicated

cemetery land is not regarded as desirable collateral by lending institutions. Such credit problems confront non-profit associations acquiring an operating cemetery as well as those acquiring undeveloped land.

28. Plaintiff never suggested or attempted to place an overriding ceiling figure on the amount that the transferors would receive; the record shows that the amount the transferors would receive was never computed in 1952. Valuations and determinations as to amounts payable under the contract did not occur until 1967 in connection with this litigation.

29. By virtue of their status as trustees, findings 15 and 25, *supra*, the former Bartolo shareholders who were the sellers under the December 1, 1952 agreement assumed and retained effective control over plaintiff's affairs. They uniformly met their fiduciary obligations under California law. It happened that their duty as trustees coincided with their interests as holders of an equity interest in plaintiff.

30. Of the total acreage conveyed to plaintiff under the December 1952 agreement, only 192.61 acres were legally dedicated to cemetery use and were available for development and sale for that purpose. Because of its dedication, it is concluded that the fair market value of this acreage should be calculated in terms of its use for cemetery purposes.

31. As the cemetery property acquired by plaintiff had been theretofore operated, one gross acre yielded 1135 grave spaces and such spaces were sold at the rate of 12,500 per year. The evidence establishes a reasonable expectation that as of 1952 a net sales price of $160 would be realized by plaintiff for each grave space. See finding 57 *infra*. In addition, the evidence shows that plaintiff's annual dollar volume of sales of mausoleum crypts and niches would consistently approximate 7 percent of its dollar volume of grave space sales for the same year. Finally,

the evidence shows that plaintiff would realize an additional net profit of not less than $125 from sales of markers, flowers, openings and closings, etc. from each interment on the property.

32. Employing the criteria stated in findings 30 and 31, *supra*, the December 1, 1952 fair market value of the 192.61 acres referred to in finding 30, *supra*, was $9,787,078; that figure being the present value (using a 7 percent present worth factor) of the net receipts to be predictably realized by plaintiff from the 192.61 acres over a period of 17½ years.

33. The evidence further shows that on December 1, 1952 the 1,962 acres acquired by plaintiff and not dedicated to cemetery use had a cash value, principally for subdivision and light industrial purposes, on the then-current market of not less than $665,000.

34. Accordingly, on December 1, 1952 the land transferred to plaintiff by the Bartolo shareholders by the agreement of that date, had a fair market value of not less than $10,452,000.

35. As heretofore noted, finding 31, *supra*, the evidence reveals a 1952 sales price of about $160 per grave and a sustained average rate of 12,500 grave sales per year plus mausoleum crypt and niche sales consistently approximating 7 percent of the dollar volume of annual grave sales. Under the purchase price percentage provisions of the December 1, 1952 agreement, as applied to the factual premises established by all of the evidence adduced in this case, and assuming that the $160 sale price remained constant, the former Bartolo shareholders collectively expected to receive a total of $615,000 per year for the 200-year period required to fully liquidate the beginning inventory of 2,444,000 gravesites at a rate of 12,500 sales per year. But the sale price did not remain at $160 per lot, instead, it rose to $243 by 1968, a rise of 52 percent, as

shown in finding 57. Naturally, this substantially increased the total potential payout.

OPERATIONS FROM DECEMBER 1, 1952 TO 1961

36. After plaintiff acquired Bartolo's stock in 1952, it proceeded as fast as John Gregg could make the development plans go. In 1952, the trustees envisaged expenditure of millions of dollars on development projects. The planned development began in 1954 and expenditures totaling about seven and three-quarter million dollars were made for the following through 1966:

Construction and improvement of administrative and mortuary buildings and sites (1954-1963)	$2,637,000
Development of hill land (1956-1965)	4,186,000
Construction of hillside chapel (1954-1958)	401,000
Construction of memorial chapel (1962-1966)	445,000
Total	7,669,000

37. On December 1, 1954, plaintiff and Bartolo entered into a credit agreement with Security and Citizens Banks. The May 14, 1951 loan agreement as amended January 10, 1952, was cancelled. The two notes of January 10, 1952 having a total outstanding balance of over $450,000 were amended pursuant to the terms of the present agreement.

Security committed itself to lend up to one million dollars and Citizens up to $500,000, at 4 percent interest until January 1, 1956 to either plaintiff or Bartolo.[6] Bartolo and plaintiff guaranteed payment of all notes of the other company and they executed a joint instrument to that effect.

[6] On May 26, 1956, Bartolo, plaintiff, Security and Citizens Banks amended the credit agreement of December 1, 1954. Security committed itself to loan an additional $1,400,000 and Citizens an additional $100,000 up to May 1, 1958. The conditions for such commitments were similar to those contained in the December 1, 1954 agreement.

The borrowers further agreed to subordinate plaintiff's obligation under the 1952 agreement to the prior payment of the notes and prior discharge of all liabilities and obligations of plaintiff under the above-mentioned guarantee agreement.

Further, the borrowers agreed to perform the 1952 agreement without any change in the terms or provisions thereof. If payments under this agreement exceeded $120,000 for any fiscal year, the two corporations agreed to promptly make a payment on their respective notes in an amount equal to such excess.

The borrowers also promised not to engage in any business other than the cemetery operation, nor make any material change in the executive management. Restrictions were also placed upon obtaining financing from other sources and on paying dividends.

38. On December 1, 1954, plaintiff, the former Bartolo shareholders (transferors) and the two banks entered into a subordination and deferral of payment agreement, pursuant to such covenants under the December 1, 1952 agreement (finding 26, *supra*). The transferors' claims were subordinated to the banks' preferential indebtedness to the extent of $2,500,000 on all obligations of plaintiff to the banks then existing or subsequently incurred, with all such notes due by December 1, 1969 at a maximum of 7 percent interest.

The agreement further provided that plaintiff would make payments to the transferors under the 1952 contract up to $120,000 annually, provided that no event or condition existed or would result by reasons of making the payments proposed that would constitute a default under the bank credit agreement. Additional payments would be subject to plaintiff's best judgment.

Further, the transferors agreed not to declare a default under the December 1, 1952 agreement for any reason, nor

to sell their interests not subject to the present agreement. All of the Bartolo shareholders who were parties to the 1952 agreement were parties to the 1954 agreement.

The credit agreement was necessary in order that plaintiff might borrow funds needed to conduct the business of the cemetery. The transferors, who were the signatories to the December 1, 1952 agreement, consented to the partial deferral of payments without interest and to the subordination.

39. The trustees frequently discussed the subject of the extensive development projects which included the grading of hill lands. Although the grading of 633 acres could have been stretched out, the trustees concluded it was impractical as there was the necessity of developing the property and maintaining an inventory of developed property at least 3 to 4 years ahead of customer demand. Accordingly, the trustees voted unanimously to continue the grading project.

In fact, a large part of the grading was undertaken prematurely from an economic standpoint. Although by 1956 plaintiff was first able to make sales of property in the area that was the subject to its first 633 acres of grading, by 1966, after sales of 67 acres of the property and some 7,600 grave spaces, 45 years of grave space inventory was still available from the 633 acres.

40. Other factors also contributed to plaintiff's cash pinch, which began in 1955 and continued into the early parts of the 1960's. The pre-need selling and consequent accounts receivable presented a cash demand for immediate sales commission expenses on these deferrd sales. The cash shortage existed despite the fact that by the December 1, 1954 credit agreement with Security and Citizens Banks (as amended May 26, 1956) plaintiff obtained a two-million dollar credit line. This was not adequate to fund the de-

from time to time by means of the reduction of Bartolo's surplus and by distributions in partial liquidation to plaintiff, Bartolo's only stockholder.

ROSE HILLS—1968

52. Plaintiff now owns approximately 2,480 contiguous acres in Whittier, California.[7] The entire property is zoned agricultural (which permits cemetery use), and is dedicated for cemetery use. Conditional use permits for cemetery utilization have been obtained on 1,300 acres.

53. Plaintiff is a memorial park—with the exception of a few upright tombstones in the original cemetery property; the memorial tablets are placed flush on the ground which enables the cemetery to be maintained in a generally beautiful park-like appearance and makes for maintenance efficiency.

Approximately 350 gross acres of the property have been fully developed—the property in which the roadways provide access, water systems are installed, grass has been planted, trees and shrubs are in place, and it is ready for interment. Six hundred acres have been rough-graded and are not fully developed.

54. Plaintiff is the largest cemetery in terms of sales of interment spaces. Since 1914, there have been over 92,500 interments (grave, crypt and niche burials) at the cemetery. About 175,000 interment spaces are sold but still unoccupied.

55. Plaintiff still has 2,160 acres of unsold land which has been dedicated for cemetery use. Such land will provide an inventory for approximately 180 more years.

56. Plaintiff sells interment spaces largely on a pre-need basis. Since 1962, it has maintained a sales force of approximately 100 persons for such efforts. Before then, it

[7] In the terms of acreage, plaintiff has the largest single location for a cemetery in the United States.

had 125 salesmen. Plaintiff is in competition with other cemeteries in the service area and others which overlap the area. These include both for-profit and non-profit cemetery corporations, with the exception of sectarian and public cemetery districts. Forest Lawn is plaintiff's principal competitor and it has a sale force of approximately 100.

Plaintiff's prices are determined by the competitive forces in its market. In the cemetery industry non-profit cemetery corporations such as plaintiff generally have business policies similar to those of for-profit cemetery corporations with respect to prices, management methods, and sales methods. Plaintiff's operations conform to that general standard.

57. Since 1947, plaintiff and its predecessor, Bartolo Company, made the following sales at the prices indicated (Plaintiff's Exhibit 134):

Year	*Graves Sold*	*Price per Grave*
1947	3,280	$108
1948	3,756	116
1949	3,157	125
1950	3,771	202
1951	11,723	139
1952	11,570	156
1953	13,068	156
1954	13,018	147
1955	12,148	154
1956	14,452	170
1957	15,171	185
1958	11,773	200
1959	11,425	203
1960	13,051	196
1961	11,837	206
1962	11,373	203
1963	11,687	213
1964	12,231	221
1965	8,265	232
1966	6,989	238
1967	7,634	243

The decrease in sales from 1965 was due solely to a smaller sales force.

58. From December 1, 1952 through September 30, 1968, plaintiff paid the former Bartolo shareholders $5,508,000 under the 1952 agreement. In the year in suit, taxpayer paid $120,000 under the agreement. As of September 30, 1968, an additional $1,884,784 was due under the contract to the sellers, but remained unpaid because of subordination agreements. Moreover, if the reduced percentages provided under the amendment to the agreement had not been in effect from 1958-1967, an additional $2,577,000 would have been due, but unpaid as of September 30, 1968.

JURISDICTIONAL FACTS

59. On February 19, 1952, plaintiff applied to the Internal Revenue Service for a ruling that it was exempt from federal income tax under section 101(5) of the Internal Revenue Code of 1939. A ruling stating that plaintiff was so exempt was issued by the Service on August 27, 1952.

On July 20, 1953, Bartolo applied to the Service for a ruling that it was exempt from taxation. That application was ultimately denied.

60. On August 14, 1964, the District Director of Internal Revenue for Los Angeles recommended that plaintiff's exemption ruling be revoked.[8] Following the filing of a protest by plaintiff and a conference with representatives of the Internal Revenue Service, plaintiff filed on February 3, 1966, a federal income tax return for its fiscal year ending September 30, 1965.[9] Plaintiff paid the tax of

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[8] On March 10, 1966, the Internal Revenue Service issued a ruling revoking the prior acknowledgment of plaintiff's tax exemption effective for all fiscal years beginning after September 30, 1961.

[9] Plaintiff claimed in the return that its cost of sales of cemetery properties was $568,247.

$237,264 shown thereon and filed a claim for refund for this amount. No portion of that amount has been refunded.

61. An audit of plaintiff's return for that year was conducted by the Internal Revenue Service and a deficiency in the amount of $6,031 was proposed. Plaintiff paid the deficiency on September 23, 1966, and on or about October 4, 1966, filed an amended claim for refund including this additional amount.[10]

62. On April 21, 1967, the Internal Revenue Service assessed an additional deficiency for the fiscal year ending September 30, 1965, of $201,959. The additional deficiency resulted from the Service's determination, *inter alia*, that $421,786, the amount which plaintiff accrued[11] during the fiscal year ending September 30, 1965 as its obligation to the sellers under the 1952 contract, of the $568,247 claimed by plaintiff as cost of sales of cemetery property, was not allowable as part of the cost of sales.[12] On June 9, 1967, plaintiff filed a second amended federal income tax return for the fiscal year ending September 30, 1965. The return reduced taxpayer's cost of sales in accordance with the Service's determination; in addition, plaintiff elected to report certain of its income on the installment basis. On this return, plaintiff reported taxable income of $523,554 and a tax liability of $245,219, of which $1,924 was unpaid. It later paid that amount.

63. On September 1, 1967, plaintiff paid the assessment of $201,959, and on October 4, 1967, it filed a further amended claim for refund in the amount of $447,178 rep-

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[10] Plaintiff conceded, however, that if it was not exempt, this additional assessment was correct.

[11] The amount accrued under the contract was $422,525. This discrepancy is not explained. In any event, it is to plaintiff's advantage that a lower figure be used.

[12] A total of $5,406 was allowed as an addition to the cost of sales resulting in a net disallowance in the cost of sales of $416,380.

resenting all taxes paid for said year, plus interest thereon. On October 9, 1967, the District Director of Internal Revenue for Los Angeles, disallowed the amended claim for refund. The Government has now conceded that plaintiff would, in any event, be entitled to report certain of its income on the installment basis. Accordingly, on December 31, 1969, the Government gave plaintiff a partial administrative refund of $201,959 with interest thereon.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to exemption from the income tax under § 501(c)(13) of the Internal Revenue Code of 1954. Accordingly, judgment is entered dismissing plaintiff's petition.

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

376-66 Rose Hills Memorial Park Association
41-72 Impresos Nacionales, S.A. } v. The United States

Before Cowen, *Chief Judge,* Davis, Skelton, Nichols, Kashiwa, Kunzig and Bennett, *Judges,* except that Judge Bennett did not participate in No. 376-66.

Order

These cases come before the court on motions for rehearing, reconsideration, or in the alternative, for clarification concerning defendant's plea of laches as an affirmative defense in a contract action against the Government, and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof,

It Is Ordered this 12th day of December, 1972, that said motions be and the same are denied as follows:

376-66 Rose Hills Memorial Park Association. Plaintiff's motion for rehearing.

41-72 Impresos Nacionales, S.A. Plaintiff's motion for reconsideration, or, in the alternative, for clarification concerning defendant's plea of laches as an affirmative defense in a contract action against the Government.

By the Court

Chief Judge